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IN THE

Supreme Court of the United States

OCTOBER TERM—1943

No. 1036 101

C. E. GROESBECK, C. V. GRAHAM, O. L. JOHNSTON, G. N. TIDD, E. P. SUMMERSON, H. L. ALLER, J. R. HOBBINS, ELECTRIC BOND AND SHARE COMPANY and EBASCO SERVICES INCORPORATED,

Petitioners,

and

S. R. INCH, A. S. GRENIER, C. F. KELLEY, S. A. MITCHELL, P. B. SAWYER, E. B. TRACY, H. T. WHITE, W. R. KENAN, W. V. GRIFFIN, L. H. PARKHURST, W. D. THORNTON, E. ERICSON, F. R. BAUER, J. W. FROST, D. W. JACK, NEBRASKA POWER COMPANY, NEW MEXICO ELECTRIC SERVICE COMPANY, NORTHERN POWER COMPANY, NORTHWESTERN ELECTRIC COMPANY, PACIFIC POWER & LIGHT COMPANY, INLAND POWER & LIGHT COMPANY, PORTLAND GAS & COKE COMPANY, SUPERIOR WATER, LIGHT AND POWER COMPANY, TEXAS ELECTRIC SERVICE COMPANY, TEXAS POWER & LIGHT COMPANY, TEXAS PUBLIC UTILITIES CORPORATION, THE WASHINGTON WATER POWER COMPANY, AMERICAN POWER & LIGHT COMPANY, CENTRAL ARIZONA LIGHT AND POWER COMPANY, FLORIDA POWER & LIGHT COMPANY, KANSAS GAS AND ELECTRIC COMPANY and THE MINNESOTA POWER COMPANY,

Defendants,

v.

DORA GOLDSTEIN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

JOHN F. MACLANE,
LOUIS CONNICK,
WHITNEY NORTH SEYMOUR,
Counsel for Petitioners.

TABLE OF CONTENTS

	PAGE
Petition	1
Opinions Below	2
Jurisdiction	2
Statute Involved	2
Questions Presented	3
Statement	5
Argument:	
I—The Integrity and Enforcement of the Stipulation	13
II—The Right of Plaintiff Stockholder to Repudiate Company Action	14
III—The Application of the Doctrine of Ex Parte Young	17
IV—The Applicability Under These Circumstances of Section 26(b) of the Holding Company Act to Violations of Section 4(a).	19
V—The Application of Section 4(a) to a Subsidiary Service Company	20
Specification of Errors	23
Reasons Relied on for Allowance of the Writ	23
Conclusion	25

PAGE

Appendix (Excerpts From Record, Briefs and Opinions Below in Electric Bond and Share Company v. Securities and Exchange Commission, 303 U. S. 419) 27

Excerpts From Stipulation..... 27

Circular No. 2780 to United States Attorneys..... 31

Circular No. 2786 to United States Attorneys..... 33

Circular to Postmasters..... 36

Press Release of Securities and Exchange Commission 37

Excerpts From Amended and Supplemental Complaint 39

Excerpts From Answer, Counterclaim and Cross-Bill 40

Excerpt From Reply of Securities and Exchange Commission, Attorney General and Postmaster General to Cross-Bill..... 42

Excerpts From Findings of Fact and Conclusions of Law of District Court..... 43

Excerpts From Opinion of District Court..... 45

Excerpts From Opinion of Circuit Court of Appeals. 49

Excerpts From Briefs Filed in the Supreme Court on Behalf of Securities and Exchange Commission, Attorney General and Postmaster General..... 50

Stipulation, Dated March 31, 1938, Made in the District Court After the Decision of the Supreme Court 52

Sections of Public Utility Holding Company Act..... 55

Section 4(a) 55

Section 20(d) 56

Section 26(b) 56

Section 27(a) 57

Table of Cases

PAGE

American Power & Light Company v. Securities and Exchange Commission, F. (2nd) (C. C. A. 1st, March 17, 1944) 17

In re American States Public Service Co., 12 F. Supp. 667 (D. Md. 1935) 8

Ashwander v. Tennessee Valley Authority, 297 U. S. 288 (1936) 14

Burco, Inc. v. Whitworth, 81 F. (2d) 721 (C. C. A. 4th, 1936) 8

City of New Rochelle v. Beckwith, 268 N. Y. 315 (1935). 20

Electric Bond & Share Company et al. v. Securities and Exchange Commission, 18 F. Supp. 131 (D. C. S. D. N. Y. 1937) 92 F. (2d) 580 (C. C. A. 2, 1937) 303 U. S. 419 (1938) 3, 5, 6, 7, 13, 21

Ex Parte Young, 209 U. S. 123 (1908) 4, 17, 18

Hill v. Wallace, 259 U. S. 44 (1922) 14

Landis v. North American Co., 299 U. S. 248 (1936).. 14

Missouri Pacific Railway Company v. Tucker, 230 U. S. 340 (1913) 17

National Fire Insurance Company v. Thompson, 281 U. S. 331 (1930) 7

National Gas Pipeline Co. v. Slattery, 302 U. S. 300 (1937) 15

Shanik v. Aller (N. Y. Sup. Ct. Kings Co., Oct. 1, 1942). 24

Venner v. N. Y. C. & H. R. R., 177 App. Div. 296 (2nd Dept., 1917), aff'd 226 N. Y. 583 (1919), cert. den. 249 U. S. 617 (1919) 20

United States ex rel. Marcus v. Hess, 317 U. S. 537 (1943) 20

Weinberger v. Semenenko, 36 N. Y. Supp. (2d) 396 (Sup. Ct. N. Y. Co., 1942) 20, 24

Table of Statutes

PAGE

Judicial Code
Section 240(a), 28 U. S. C. A., Sec. 347(a)..... 2

Public Utility Holding Company Act of 1935
Section 2(a)(7), 15 U. S. C. A., Sec. 79b(a)(7)..... 21
Section 2(a)(8), 15 U. S. C. A., Sec. 79b(a)(8)..... 21
Section 3, 15 U. S. C. A., Sec. 79c..... 21
Section 4(a), 15 U. S. C. A., Sec. 79d(a).....2, 4, 5, 8, 9, 11, 13, 14, 18, 20, 21, 22, 55
Section 5, 15 U. S. C. A., Sec. 79e.....9, 11, 12, 18
Section 6, 15 U. S. C. A., Sec. 79f..... 21
Section 7, 15 U. S. C. A., Sec. 79g..... 21
Section 8, 15 U. S. C. A., Sec. 79h..... 21
Section 9, 15 U. S. C. A., Sec. 79i..... 21
Section 11, 15 U. S. C. A., Sec. 79k..... 21
Section 12(a), 15 U. S. C. A., Sec. 79l(a)..... 21
Section 12(b), 15 U. S. C. A., Sec. 79l(b)..... 21
Section 12(c), 15 U. S. C. A., Sec. 79l(c)..... 21
Section 12(d), 15 U. S. C. A., Sec. 79l(d)..... 21
Section 12(e), 15 U. S. C. A., Sec. 79l(e)..... 21
Section 12(f), 15 U. S. C. A., Sec. 79l(f)..... 21
Section 13, 15 U. S. C. A., Sec. 79m..... 21
Section 15, 15 U. S. S. A., Sec. 79o..... 21
Section 17, 15 U. S. C. A., Sec. 79q..... 21
Section 18, 15 U. S. C. A., Sec. 79r..... 4
Section 20(d), 15 U. S. C. A., Sec. 79t(d).....4, 19, 56
Section 26(b), 15 U. S. C. A., Sec. 79z(b)..2, 4, 5, 12, 19, 56
Section 27(a), 15 U. S. C. A., Sec. 79z-1(a).....2, 20, 57

Table of Authorities

50 Harvard Law Review 655..... 8

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, C. E. Groesbeck, C. V. Graham, O. L. Johnston, G. N. Tidd, E. P. Summerson, H. L. Aller, J. R. Hobbins, Electric Bond and Share Company and Ebasco Services Incorporated, respectfully pray that a writ of cer-

tiorari be issued to review the decree of the United States Circuit Court of Appeals for the Second Circuit, entered in the above cause on April 7, 1944, pursuant to decision of that Court rendered on the same date, reversing and remanding judgments of the United States District Court for the Southern District of New York which dismissed the complaint of the respondent Dora Goldstein against the petitioners and others.

Opinions Below

The orders and judgments of the District Court dismissing the complaint were filed July 15, 1942 (R. pp. 83-88). There was no opinion.

The opinion of the Circuit Court of Appeals (R. pp. 104-112) has not yet been officially reported.

Jurisdiction

The opinion of the Circuit Court of Appeals was filed April 7, 1944 (R. pp. 104-112). Rehearing was denied April 27, 1944 (R. pp. 112, 113). The decree of the Circuit Court of Appeals sought to be reviewed was entered May 13, 1944 (R. p. 114). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended (28 U. S. C. A. § 347(a)).

Statute Involved

The statute involved is the Public Utility Holding Company Act of 1935, and specifically Sections 4(a)(2), 20(d), 26(b) and 27(a) (15 U. S. C. A. §§ 79d(a)(2), 79t(d), 79z(b) and 79z-1(a)). For the convenience of this Court, these sections are set out at the end of the appendix.

Questions Presented

1. This petition presents fundamentally the question of the integrity of the stipulation between the Government, represented by the Attorney General, the Postmaster General and the Securities and Exchange Commission, and Electric Bond and Share Company and subsidiaries of that Company, upon which, as the test case, the constitutionality of the registration provisions of the Public Utility Holding Company Act of 1935 was tried and determined, resulting in the decision and judgment of this Court in *Electric Bond and Share Company, et al.* v. *Securities and Exchange Commission,* 303 U. S. 419, March 28, 1938. As will be hereinafter shown, all officers of the Government concerned with the enforcement of the Public Utility Holding Company Act extended immunity from the enforcement of civil or criminal penalties thereby imposed for any acts in contravention thereof done pending determination of the constitutionality of the registration provisions in this case. The stipulation formally embraced the covenant of immunity and the parties and the Courts before which the case was tried accepted it as such. The decree of the Circuit Court of Appeals here sought to be reviewed effectively breaches that covenant by sustaining the most drastic penalty of the Act, the virtual avoidance of all business contracts made or carried out by the parties in reliance on that covenant during the pendency of the litigation.

2. Where a company, in the course of resisting, on constitutional grounds, a suit by the Government to enforce a statute, enters into a stipulation of the character above described with the Government enforcement authorities and conducts its business as usual in accordance with the intent of such stipulation for the purpose of testing the

statute, may a stockholder of that company repudiate the action of the company in making the stipulation, and, in contravention of the findings on which the judgment of the court in such case is predicated and sustained, enforce against other parties to such suit statutory penalties imposed for so conducting its business, to wit, the avoidance of contracts lawful except for the statute, and the recovery of all moneys paid thereunder?

3. Does the doctrine of *Ex Parte Young*, 209 U. S. 123 (1908), protect a litigant, who in good faith challenges the constitutionality of a statute, against the imposition of destructive civil penalties pending determination of the constitutionality of the statute, so as to preclude a Court in a subsequent proceeding by or on behalf of one of the parties to the test suit from enforcing such penalties?

4. Does Section 26(b) of the Public Utility Holding Company Act, which declares void contracts, the performance of which involves the violation of any provision thereof, apply to violations of Section 4(a) of the Act, which this Court has held to be purely penal in its nature, where the Government officers and agencies entrusted by Section 18 thereof with its enforcement have formally agreed not to enforce such penalties pending determination of the constitutionality of the statute, particularly in view of the provision of Section 20(d) (15 U. S. C. A. § 79t(d)) of the Act that no provision thereof imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule, regulation or order of the Securities and Exchange Commission?

5. Do the provisions of Section 4(a) of the Act, which prohibit an unregistered holding company from "directly

or indirectly" using the mails or instrumentalities of commerce for performing service contracts, prohibit the performance of such contracts by a subsidiary organized for the purpose, in view of the background of the Act and the textual distinctions drawn therein between acts prohibited to holding companies and acts prohibited to their subsidiaries?

Statement

This action was instituted in the District Court for the Southern District of New York by a stockholder of American Power & Light Company to recover judgment against the defendants Electric Bond and Share Company and Ebasco Services Incorporated, and former and present directors of American Power & Light Company, for service fees paid by subsidiary operating public utility companies of American Power & Light Company to Ebasco Services Incorporated, a service subsidiary of Electric Bond and Share Company, for the period from December 1, 1935, when the registration provisions of the Public Utility Holding Company Act became effective, to April 1, 1938, when Electric Bond and Share Company and American Power & Light Company registered as holding companies under said Act, on the ground that the performance of said services was prohibited by Section 4(a)(2) of the Act and contracts therefor were rendered void by Section 26(b). This was the period during which Electric Bond and Share Company and its associated holding companies were challenging the constitutionality of the Act in a test suit for enforcement brought by the Securities and Exchange Commission. This suit resulted in the decision of this Court sustaining the constitutionality of the registration provisions of the Act. *Electric Bond and Share Company* v. *Securities and Exchange Commission, supra.*

The cause of action above described is the First cause of action in plaintiff's complaint (R. pp. 6-18). The Second and Third causes of action (R. pp. 19-23) were dismissed by separate stipulations (R. pp. 82, 101).

Certain corporate and individual defendants moved to dismiss the action on the ground of improper venue as to them and the motion was sustained (R. pp. 66-73). Thereupon the present petitioners moved for dismissal on the ground both that the complaint failed to state a claim upon which relief could be granted, and because of the absence of indispensable parties, including those corporations as to which the action had been previously dismissed (R. pp. 83-86). These motions were sustained and judgments of dismissal were entered (R. pp. 83-88). By the Court's opinion, however, it appears that the motions were granted solely because of the absence of indispensable parties without passing upon the sufficiency of the complaint upon its merits (R. p. 89).

Appeal was taken to the Circuit Court of Appeals for the Second Circuit and the judgments were reversed and the cause remanded (R. p. 114). From the opinion of that Court, it appears that it sustained the venue in the Southern District of New York and also expressly sustained the complaint as sufficient "to state a claim or claims for relief in the right of the operating companies" (R. pp. 104-112). In so doing the Court made what was in substance a dispositive order, in effect holding the petitioning defendants liable as a matter of law, on the complaint and despite the stipulation and record in *Electric Bond and Share Company* v. *Securities and Exchange Commission, supra,* leaving only the amount of liability to be determined upon accounting (R. p. 110).

This petition seeks a review only of the portion of the decision of the Circuit Court of Appeals which deals with

the sufficiency of the complaint, and invokes in support hereof the record in *Electric Bond and Share Company* v. *Securities and Exchange Commission, supra,* as well as the provisions of the statute. The Circuit Court of Appeals properly took judicial notice of this record as part of its records in another suit involving the same substantial parties. *National Fire Insurance Company* v. *Thompson,* 281 U. S. 331, 336 (1930).

Since the record in *Electric Bond and Share Company* v. *Securities and Exchange Commission, supra,* is also a part of the records of this Court and the essential facts, other than those pertaining to the portions of the stipulation and excerpts from the record bearing on its construction, are summarized in this Court's opinion in that case, we will but briefly state the facts bearing on the questions here presented without further reference than to this Court's opinion, supplemented, however, by an abstract of such portions of the record in the above mentioned case as bear specifically upon the questions presented. For the convenience of the Court we attach this abstract as an Appendix hereto, and hereafter reference to that record will be to pages of the Appendix, thus distinguishing from the record in the instant case.

Electric Bond and Share Company is one of the major public utility holding companies of the country. It has three principal public utility holding company subsidiaries in the United States, American Power & Light Company, of which plaintiff is a stockholder, Electric Power & Light Corporation and National Power & Light Company. A fourth company, American Gas and Electric Company, is also classed as a subsidiary, but its relationships are different and it is in no way involved in the present problem.

Electric Bond and Share Company owns varying percentages of the voting stock of these subholding companies;

in the case of American, it owns approximately 20%. Each of these subholding companies owns substantial majorities, in some cases approximately all, of the voting stock of public utility operating subsidiaries.

In addition to this stock ownership, Electric Bond and Share Company performed, until November, 1935, extensive services to these operating public utilities for stated fees.

Following the approval of the Public Utility Holding Company Act on August 26, 1935, and prior to the effective date of the registration provisions on December 1, 1935, Bond and Share effected an internal reorganization of its system, including the creation of a wholly owned subsidiary, Ebasco Services Incorporated, to perform the service functions for operating public utilities formerly rendered by Bond and Share itself.

This will be referred to later. It is sufficient to state here that by Section 4(a) of the Act it is made unlawful for unregistered holding companies, directly or indirectly, to transact any of their normal functions which involve the use of the mails or instrumentalities of commerce and specifically to negotiate, make or perform "any service, sales or construction contracts."

It is part of the legal history of these times that grave doubts existed as to the constitutionality of the Public Utility Holding Company Act and that some forty-eight suits were brought in various District Courts of the United States by different holding companies to test the validity of that Act (see Note, 50 Harvard L. Rev. 655 (1937)). One of these, *In re American States Public Service Co.*, 12 F. Supp. 667, prior to December 1, 1935, had resulted in a broad decision of unconstitutionality by a District Court. This decision was later affirmed by the Fourth Circuit Court of Appeals in *Burco, Inc.* v. *Whitworth*, 81 F. (2d) 721

(C. C. A. 4th, 1936), the decision, however, being qualified by eliminating the blanket declaration of unconstitutionality.

Confronted by this situation the Securities and Exchange Commission, which was entrusted by the Act with the primary duty of its enforcement, the Attorney General, and the Postmaster General, all made public pronouncements that penalties of the Act would not be enforced against non-conforming companies until and unless the constitutionality of its registration provisions was sustained and that a suit would be promptly brought to adjudicate that question. Accordingly, on November 26, 1935, prior to the effective date of the registration provisions of the Act, the Securities and Exchange Commission brought suit to enjoin Electric Bond and Share Company, American Power & Light Company and other subsidiary holding companies in the Electric Bond and Share system, from violating the provisions of Section 4(a) of the Act, and thus to compel registration as required by Section 5 of the Act.

The defendants filed a cross-bill seeking to challenge the constitutionality of the entire Act, bringing in as parties the individual members of the Commission, the Attorney General and Postmaster General, and asking for both temporary and permanent injunction against enforcement of the Act and the penalties imposed thereby.

In order to expedite the proceedings and avoid the delay and expense incident to the taking of evidence at a formal trial, a stipulation was entered into by the Securities and Exchange Commission and cross-defendants and the defendant Companies containing an exhaustive description of the history, relationship and activities of the Companies so as to demonstrate against a full and adequate factual background the impact of the Act upon what was deemed to be

a typical public utility holding company situation. By this stipulation it was agreed that neither the Attorney General, the Postmaster General nor the Commission, respectively, had instituted or would institute civil or criminal proceedings against the defendants until the constitutionality of Sections 4(a) and 5 of the Act had been determined, and that if such sections were determined to be constitutional no civil or criminal proceedings for prior violations of the Act would be had. The full text of the public announcements by the Attorney General, Postmaster General and Commission, and of the pertinent paragraphs of the stipulation, are included in the Appendix (Appendix, pp. 28-39).

Placing full faith in and reliance upon these declarations and the stipulation the defendants, including Electric Bond and Share Company, Ebasco Services Incorporated and American Power & Light Company, continued the conduct of their business pending the outcome of the case. Reciprocally, defendants refrained from instituting a multiplicity of suits, securing preliminary injunctions or otherwise creating procedural embarrassments (see p. 15, *infra*).

In their briefs and arguments before the District Court, the Circuit Court of Appeals and the Supreme Court, the Government, through its counsel, took the position that the defendants were immune from the consequences, including those imposed by Section 26, of violations of the Act until final determination by the Supreme Court (Appendix, p. 50). As conclusive illustration it is sufficient to quote here the express statement from the brief in this Court, signed by the Attorney General, the Solicitor General, counsel to the Securities and Exchange Commission and special assistants to the Attorney General, the latter by the way being the draftsmen of the Act, as follows:

> "If defendants believe that the registration provisions of the Act are unconstitutional, it is their

> privilege—and they have exercised it—to refrain from voluntary compliance. By their decision defendants have made it possible for themselves and their subsidiaries to sell securities, to acquire securities and utility assets, *to perform service, sales, and construction contracts,* to make 'up-stream loans,' to engage in other intra-system transactions, and to keep their accounts in any manner which they see fit without running afoul of the provisions of sections 6 to 15, and without fear of the taint of illegality which section 26 might otherwise cast upon such transactions." (Brief for Respondents, pp. 208-209. Emphasis supplied.) (Appendix, p. 50.)

Confirming this position of counsel, the District Court made findings as follows (Appendix, pp. 43, 44):

> "64. Other than Sections 4(a) and 5(a), the provisions of the Act (with minor exceptions not material to this cause) apply only to registered holding companies and their subsidiary companies. Each defendant is a non-registered holding company, and as such, no provision of the Act, other than the provisions of Sections 4 and 5(a) of the Act, is applicable, can be applied, or has been threatened by the plaintiff or any cross-defendant or any other officer or agency of the United States, to be applied, to any of them.
>
> 66. * * * Until the provisions of the Act other than Sections 4(a) and 5 become applicable to the defendants, neither they nor their subsidiary companies show any irreparable or substantial injury, impending or threatened."

The injunction decree was limited to violations of Sections 4(a) and 5 of the Act and was made effective thirty days after the date of the decree until registration, but its effectiveness was postponed in the event of appeal until thirty days after the filing of the mandate of the appellate court in the District Court.

As will be seen from reference to quotations from the record in the Appendix, the cross-bill filed by the defendants in this action sought to bring into question the constitutionality of the whole Act, with particular reference, among other sections, to Section 26(b), and prayed for injunction, both temporary and permanent, restraining their enforcement. The District Court, in disposing of the cross-bill and ordering its dismissal, distinctly held that sections of the Act subsequent to Section 5 were not applicable to unregistered companies and that the stipulation granted adequate protection by injunction against loss or damage which the defendants might sustain prior to the decision of the Supreme Court (Appendix, p. 48).

The decision of the District Court was sustained in every particular by the Circuit Court of Appeals and the Supreme Court. The Supreme Court expressly held Sections 4(a) and 5 to be completely separable from the remainder of the Act, and sustained Section 4(a) purely as a penal provision to compel compliance with Section 5. The Court said (pp. 442, 443 of 303 U. S.):

> "Section 4(a) prescribes the penalty for failure to register under § 5, and that section as an incident to registration imposes the duty to file the described registration statement. Treating the requirements of §§ 4(a) and 5 as a separable part of the Act, the question is whether that penalty may be validly imposed.
>
> In the imposition of penalties for the violation of its rules, Congress has a wide discretion. * * *
>
> In the instant case, the penalty attaches to the use of the instrumentalities of commerce and of the mails by those who, engaged in that use, refuse to submit to § 5 and thus through registration and the statement which is incident to registration to supply the information which Congress is entitled

> to demand, and has demanded, with respect to their organization and practices. * * * To escape the penalty and the enforcing provisions of the decree, all that the defendants have to do is to register with the Commission and assume, under § 5, the obligation to file the described registration statement."

The foregoing is, we believe, a sufficient background against which to pose the questions above presented. Without extended argument, we shall discuss them briefly in the order stated.

Argument

1. The Integrity and Enforcement of the Stipulation

It must be apparent that the plaintiff's complaint cuts athwart the public pronouncements of the Government enforcement officials, the stipulation embodying them, the position of counsel and the decision of the Courts in *Electric Bond and Share Company* v. *Securities and Exchange Commission, supra.* Section 4(a) prohibits unregistered public utility holding companies from "directly or indirectly" conducting any business at all, involving use of the mails or instrumentalities of commerce, and even from continuing to possess the securities of their regular subsidiaries. To hold that the promise of immunity pending determination of the constitutionality of the Act, extended by the responsible officers of the Government, still left the companies subject to avoidance and return of the consideration paid in substantially all business transactions which the holding companies might conduct through themselves or their subsidiaries during the period of test, robs it of its primary value. The monetary penalty for failure to register was the maximum fine of $200,000.

The civil penalty which the Circuit Court of Appeals here proposes to invoke, as applied to the instant case, is many times that amount, and, if extended throughout the gamut of the prohibitions of Section 4(a), the effect on countless transactions conducted in good faith might well be incalculable. Such a result, we think, is clearly made impossible by the decision of this Court in which Section 4(a) is treated solely as a penal and not as a regulatory provision, intended to coerce registration and nothing else. It is as much a penalty as a fine or a jail sentence and as such is enforcible by the Government and not at the suit of a citizen, regardless of his interest or lack of interest in the subject matter. The complaint here charges no damage or loss and does not propose to acknowledge or offset any benefits. It is purely to enforce the penalty as such.

2. The Right of Plaintiff Stockholder to Repudiate Company Action

The plaintiff sues as a stockholder of American Power & Light Company, one of the defendants to the test case in which the stipulation was made. The directors of the Company, on advice of counsel, as shown by the stipulation (Appendix, pp. 27, 28), had been advised to test the constitutionality of the statute. In view of these circumstances, any other course would have been a dereliction of duty. See *Hill* v. *Wallace,* 259 U. S. 44, 61 (1922); *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288 (1936). In determining to test the Act, the directors had no choice but to refuse to register and seek the protection of an injunction against the imposition of penalties pending determination. Such an injunction was offered by the Government in *Landis* v. *North American Co.,* 299 U. S. 248, 252 (1936), and the stipulation here was equivalent to temporary injunction as this Court has held. *Na-*

tional Gas Pipeline Co. v. *Slattery,* 302 U. S. 300, 310 1937). This is confirmed by the final decree entered with the District Court on the mandate of this Court by consent of counsel for the Government.

This decree embodied by reference a further stipulation, dated March 31, 1938, between counsel for the Government and for defendants, that the stipulation in the cause was made "in order to avoid the necessity of multiplicity of suits, preliminary injunctions and procedural embarrassments," and that it was the intention of the parties through their counsel in framing the decree to allow the defendants time to register in an orderly manner after entry of judgment on the mandate, without incurring liability for contempt proceedings or "civil or criminal proceedings for violations of the Act committed before the termination of said period," and agreed "that there shall not be instituted civil or criminal proceedings against the defendants or any of them, or against their directors, officers, agents or employees or any of them, for any violation of the Act committed by them or any of them prior to the expiration of thirty days from the entry of said judgment upon said mandate" (Appendix, pp. 52-55).

The Government's complaint charged, among the violations of the statute in detail the existence and performance of service contracts by use of the mails and instrumentalities of commerce (Appendix, p. 39). These allegations were admitted by the answer, and it is specifically alleged that "such contracts and relationships are of value to the parties hereto and their termination would result in monetary losses and losses in economy and efficiency of operation" (*id.,* pp. 40-42). The existence and performance of such contracts are dwelt on at length in the decisions of the District Court, the Circuit Court of Appeals and the Supreme Court, as a principal ground of de-

cision. To have terminated these contracts, irrespective of the loss suffered thereby, would have abandoned one of the principal points upon which Court decision was desired by both the Government and the companies.

There is thus here presented the question whether a single minority stockholder may, under these circumstances, repudiate the formal action of the directors of his Company and sue for penalties which obviously the Company was itself estopped to seek. There is also presented the further question whether such a stockholder is not equally estopped, with the corporation party to such suit, thus collaterally to attack the findings of the District Court constituting an essential part of its decision in the test case, which in effect precludes the cause of action by declaring that the section of the statute upon which the action is based is without application (see p. 11, *supra*).

It is here held by the Circuit Court of Appeals, citing authority, that the suit may be maintained because of the control exercised by Electric Bond and Share over plaintiff's corporation (R. p. 110). But the authorities cited have to do with the remedy of wrongs suffered by the corporation which, by reason of the control, it is unable to remedy. Here there is no allegation of wrong but a bare allegation of statutory violation, in consequence of which it is sought to invoke the statutory penalty. The remedy given to stockholders in the cases cited is to redress violations of fiduciary duty by the directors of the controlled corporation. Here there was not a violation but a performance of that duty.

The importance of the litigation to American Power & Light Company may be indicated by the fact that it is presently under an order of dissolution made by the Securities and Exchange Commission and affirmed by the Cir-

cuit Court of Appeals for the First Circuit. See *American Power & Light Company* v. *Securities and Exchange Commission,* F. (2d) (C. C. A. 1st, March 17, 1944) (not yet officially reported). There can surely be no question that an effort to avoid such a result which was clearly envisaged by counsel and directors for the Company in determining to test the constitutionality of the Act was an act in good faith to conserve the interests of the Company and its stockholders and not in derogation thereof.

In these circumstances, we submit that the action of the directors in defending the Government's suit and entering into the stipulation was done in good faith in the interests of the Company. It must follow that stockholders, such as respondent, as well as the Company, are bound thereby.

3. The Application of the Doctrine of *Ex Parte Young*

It is well settled that a combination of civil and criminal penalties so extreme as effectually to destroy the entire business of a company, which in good faith seeks to test the constitutionality of a statute, may not constitutionally be applied during the period of such test. *Ex Parte Young,* 209 U. S. 123 (1908); *Missouri Pacific Railway Company* v. *Tucker,* 230 U. S. 340 (1913). This was conclusively recognized in the test case by the final decree on mandate entered by the District Court as above quoted. The penalties here sought to be invoked, while purely civil in nature, are clearly more drastic than criminal penalties and their application is completely destructive of the right of the Company recognized by the Government to test the statute.

As hereinbefore stated, a primary object of the promise of immunity held out by the Government enforcement officials to the industry and its embodiment in the stipula-

tion was to avoid the embarrassment of multiplicity of suits and preliminary injunctions and the possibility of incurring a partial and inconclusive determination of the case through the application of the doctrine of *Ex Parte Young*. The decision of the Court below in effect frustrates that intention by retroactively applying to the parties penalties which might otherwise have been avoided under the doctrine of that case by raising such questions expressly in the test case.

If this question be not deemed obviated by the stipulation in the test case, then the construction of the statute by the Court below under the circumstances of this case raises grave doubts as to its validity as so construed in the light of *Ex Parte Young*.

The Court below brushed aside these considerations on the "pragmatic" ground that the petitioners had actually challenged the constitutionality of the statute and obtained a final decision. That is plainly no answer, for defendants' attack and the consideration of this Court were based upon the stipulation which freed the Government of essentially extraneous obstructions to a consideration of the merits of the statute. Thus the stipulation and its meaning cannot be so casually disregarded. Moreover, this Court's decision of constitutional issues in the test case was expressly limited to Sections 4 and 5 (see p. 443 of 303 U. S.).

The parties and the Court in the test case clearly recognized the applicability otherwise of the doctrine of *Ex Parte Young* by including by stipulation in the final decree on mandate the equivalent of an injunction against the enforcement of penalties for past acts.

4. The Applicability Under These Circumstances of Section 26(b) of the Holding Company Act to Violations of Section 4(a)

Irrespective of other considerations and as a mere question of statutory construction, we submit that Section 26(b) of the Act is inapplicable to violations of Section 4(a). As herein previously stated, this was expressly held by Judge MACK in his findings in the test case, was expressly recognized by counsel for the Government, and is implicit in the decision of this Court as hereinbefore quoted.

Furthermore, although it was squarely presented in the briefs, the Circuit Court of Appeals does not consider, even to brush aside, the provision of Section 20(d) of the Act (15 U. S. C. A. 79t(d)), that no provision thereof

> "imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule, regulation, or order of the Commission, notwithstanding that such rule, regulation, or order may, after such act or omission, be amended or rescinded or be determined by judicial or other authority to be invalid for any reason."

Clearly the published release of the Commission and its stipulation in the test case constituted formal action by it suspending the imposition of any liability under Section 26(b). If it were not otherwise clear from the whole tenor of the statute, this provision makes it clear that the enforcement of the Act as a regulatory measure and its interpretation, subject to review of the Courts, is vested in the Securities and Exchange Commission. While obviously civil rights and liabilities may arise from the statute or orders of the Commission thereunder, yet where the Commission rightly or wrongly interprets its powers so as to relieve any person from statutory penalties and the person

affected in good faith performs acts otherwise prohibited within the purview of such order, it is immune from such statutory liability.

That it is not the function of a stockholder's derivative action to vindicate public justice is well settled. *Venner* v. *N. Y. C. & H. R. R.*, 177 App. Div. 296 (2d Dept. 1917), aff'd, 226 N. Y. 583 (1919), cert. den., 249 U. S. 617 (1919). A private person, moreover, may not ordinarily assume the enforcement of a penalty statute. *City of New Rochelle* v. *Beckwith*, 268 N. Y. 315 (1935); compare *United States ex rel. Marcus* v. *Hess*, 317 U. S. 537 (1943). Accordingly, it would seem that Congress intended to leave to the Securities and Exchange Commission the enforcement of any penalties under the Public Utility Holding Company Act. The exercise of concurrent jurisdiction by the Courts at the instance of private parties to enforce penalties under the Holding Company Act would inevitably introduce confusion in the administration of that Act by the Securities and Exchange Commission. *Weinberger* v. *Semenenko*, 36 N. Y. Supp. (2d) 396, 405-6 (Sup. Ct. N. Y. Co., 1942) (no official citation).

5. The Application of Section 4(a) to a Subsidiary Service Company

The Circuit Court of Appeals held (R. pp. 109, 110) that since Section 4(a) makes it unlawful for unregistered holding companies to enter "directly or indirectly" into service contracts, and Section 27(a) makes it equally unlawful for any person to do anything through another which he could not do himself, the performance of service contracts by Ebasco Services was within the prohibitions of Section 4(a) and unlawful.

We submit that this construction of these sections of the Act ignores the inherent nature of the holding company

business and the structure of the Act, which recognized that nature and carefully distinguished throughout between holding companies and their subsidiaries and the prohibitions and regulations applicable to each.

While ordinarily statutory prohibitions may not be avoided through what the Chief Justice in *Electric Bond and Share Company* v. *Securities and Exchange Commission, supra,* termed "modal arrangements," this Act of necessity had to distinguish between holding companies and their subsidiaries in order to permit the electric power industry of the country to function. Consequently, the Act throughout separately defines a "holding company" (Section 2(a)(7)) and a "subsidiary company" (Section 2(a)(8)) and in various sections differentiates between the holding companies and subsidiaries as so defined and the prohibitions and regulations applicable to each. (See Sections 3, 6, 7, 8, 9, 11, 12(a), 12(b), 12(c), 12(d), 12(e), 12(f), 13, 15 and 17.) As particularly applicable here, Section 13 expressly differentiates between holding companies and subsidiaries in prohibiting absolutely the performance of any service contracts by holding companies, but expressly authorizing the performance of such contracts under regulation by the Commission by holding company subsidiaries.

Section 4(a) recognizes this differentiation in its specific prohibition by clauses 1 to 5, inclusive, which are directed solely against holding companies, and clause 6 which prohibits holding companies from owning the stock of subsidiaries which commit the prohibited acts. Both the District Court and the Circuit Court of Appeals in the *Electric Bond and Share Company* test case commented on this feature of the Act. Judge MACK, in the District Court, stated (18 F. Supp. 131 at p. 147) (Appendix, p. 47):

> "Paragraph (6) is an essential part of the regulations in the registration provisions, if the other paragraphs of section 4(a) are to have any appreciable effect. Without it, it is only necessary for any holding company to transfer its activities to its subsidiaries in order to escape the regulations. A good example of how this might be done is provided in the organization of Ebasco, and the transfer of its service contracts and facilities by Bond & Share to this 100 per cent. owned subsidiary."

And the Circuit Court of Appeals said (92 F. (2d) 580 at p. 591) (Appendix, p. 49):

> "By Section 4(a)(6) of the Act (15 U. S. C. A., Sec. 79(d)(a)(6), Congress has not attempted to disregard the corporate entity of any corporation. The provisions of the Act which regulate the relations between the holding company and its subsidiary take into full account the existence, separation, and protection of such entities. Congress has found that in certain situations the proper regulation of interstate commerce and postal activities of the subsidiary requires the regulation of the controlling company. 'It is with the system that the law must deal, not with its elements.' "

Any other construction would have been utterly destructive of the public utility industry. What was sought by Section 4(a) was to coerce holding companies to register. It did not attempt to prohibit their subsidiaries from functioning if their holding company should prove recalcitrant. Otherwise the entire electrical business of the country would have been paralyzed, as the use of the mails and other instrumentalities of interstate commerce would have been in effect prohibited to the entire industry in its most minute ramifications.

The Court's suggestion that Ebasco Services Incorporated was created "for the express purpose of contravening the Act" (R. pp. 109, 110) is purely gratuitous. The creation of this subsidiary was not only a recognition by Electric Bond and Share Company of the distinctions drawn by Section 4(a) itself but was also an essential step towards placing the companies in the Electric Bond and Share Company system in a position promptly to comply with the Act (specifically Section 13, which prohibits holding companies to perform services but permits subsidiaries to be formed for that purpose) in the event that the Act should finally be held constitutional. The decision of the Supreme Court in the test case was rendered on March 28, 1938, and on April 1st of that year the Companies registered and Ebasco Services was enabled to continue to function within the confines of the Act without interruption of business. This would have been impossible had Ebasco not been created.

Specification of Errors

The Circuit Court of Appeals erred in reversing and remanding the judgment of dismissal of the District Court and in holding that the first cause of action in plaintiff's complaint stated a claim or claims for relief.

Reasons Relied on for Allowance of the Writ

On the facts and argument hereinbefore stated, it is submitted that the writ should be granted. The issue presented is fundamentally one of the integrity of the judicial processes of the country and the protection of litigants in reliance upon the responsible officials of the Government in the prosecution and defense of litigation. Ampli-

fication of this statement would be mere repetition of what has been said before.

It must also be apparent that the questions presented are of prime and fundamental importance in the future administration of the judicial process. If the decision of the Circuit Court of Appeals be sustained, it is difficult to see how any citizen may challenge the constitutionality or applicability of statutes no matter how well founded the challenge may be if, regardless of the assurance of protection against penalties extended to him by injunction or stipulation of the Government, he must incur the risk of utterly destructive civil penalties in the event he is unsuccessful in the litigation.

It would be equally embarrassing to the enforcement officials of the Government in attempting to avoid, in situations of this kind, the procedural embarrassments of litigation having for its purpose the determination of novel and important questions, if litigants were no longer able to extend full faith and credit to their procedural stipulations.

For the information of this Court, the Supreme Court of the State of New York, County of New York, has reached an opposite conclusion from the Court below, *Weinberger* v. *Semenenko,* 36 N. Y. Supp. (2d) 396 (Sup. Ct., N. Y. Co., 1942) (no official citation). This decision was followed by the Supreme Court of the State of New York, Kings County, in *Shanik* v. *Aller* (N. Y. Sup. Ct., Kings Co., Oct. 1, 1942) (no reported decision). In addition, as shown above, the decision of the Court below as to the application of Section 26 is in direct conflict with the decision of this Court in the test case and is probably in conflict with the other decisions of this Court cited above. The precise questions presented by this case have not been, but should be, settled by this Court.

Conclusion

WHEREFORE petitioners respectfully pray that a writ of certiorari be issued to the United States Circuit Court of Appeals for the Second Circuit in accordance with the practice of this Court and that a hearing upon and determination by this Court of the matters presented be had.

Dated: May 26, 1944.

Respectfully submitted,

JOHN F. MACLANE
LOUIS CONNICK
WHITNEY NORTH SEYMOUR
Counsel for Petitioners.

APPENDIX

Excerpts From Record, Briefs and Opinions Below in *Electric Bond and Share Company* v. *Securities and Exchange Commission*, 303 U. S. 419

(References are to the volume and page of the Printed Record.)

Excerpts From Stipulation

ARTICLE II

FAILURE TO REGISTER UNDER, EXEMPTIONS FROM, AND VIOLATIONS OF, THE ACT

5. *Failure to Register under the Act.*

Bond and Share, the holding defendants and the holding-operating defendants, having been advised by counsel that the Act, in their opinion, is unconstitutional, and that registration thereunder

> "would involve a sacrifice of the status of a non-registered holding company, and would probably leave the company in a position where it would be required to attack specifically every order of the Commission which was deemed to be unlawful and violative of its rights. The future of the company would be so clouded as to make it very difficult, if not impossible, for it to function effectively, pending the time that the Commission made some order, rule or regulation which would be sufficiently broad to permit a general challenge of its powers, and determination of the company's rights;"

(plaintiff and cross-defendants admitting only that responsible counsel so advised the defendants and expressly deny-

ing concurrence in counsel's opinion) have not registered with the Commission pursuant to Section 5 of the Act, and they have stated that they do not intend voluntarily so to register. (Vol. II, p. 268.)

* * * * * *

"8. *The Attorney General.*

The Attorney General has not instituted, nor has he threatened to institute, nor has he been requested to institute civil or criminal proceedings against the defendants or any of them, or any of their directors, officers, agents or employees for any violation of the Act, and he does not intend to institute such proceedings, at least until the constitutionality of Sections 4 and 5 of the Act has been finally adjudicated in this proceeding and after receipt of a request from the Commission to institute such proceedings. In the event that Sections 4 and 5 of the Act are finally adjudicated to be constitutional in this proceeding, the Attorney General will not institute civil or criminal proceedings against the defendants or any of them, or against their directors, officers, agents or employees for any violation of the Act committed by them or any of them prior to the date of such adjudication. On November 21, 1935, the Attorney General publicly disclaimed any intention of instituting criminal proceedings for violations of the Act prior to an adjudication by the Supreme Court of the United States of the constitutionality thereof, and requested all United States Attorneys to act accordingly, by means of two written circulars transmitted to them and dated November 21, 1935 and December 7, 1935, respectively. Exhibits 2 and 3 are copies of such circulars." (Vol. II, p. 271.)

"9. *The Postmaster General.*

The Postmaster General has not excluded, nor has he threatened to exclude, nor has he been requested to exclude from the mails matter sent or attempted

to be sent by the defendants or any of them in violation of the Act, and, whatever may be his authority under the Act, does not intend to exclude the defendants or any of them from using the mails for the transmission of matter in violation of the Act, at least until the constitutionality of Sections 4 and 5 of the Act is finally adjudicated in this proceeding. The Postmaster General has not threatened to request and will not request the Attorney General nor any United States Attorney to prosecute the defendants or any of them, or any of their directors, officers, agents or employees for using the mails in violation of the Act, at least until the constitutionality of Sections 4 and 5 of the Act has been finally determined in this proceeding. In the event that Sections 4 and 5 of the Act are finally adjudicated to be constitutional in this proceeding, the Postmaster General will not request the Attorney General or any United States Attorney to prosecute the defendants or any of them, or any of their directors, officers, agents or employees, for any use of the mails, declared to be unlawful under the Act, which occurred prior to the date of such final adjudication. On December 4, 1935, the Postmaster General publicly disclaimed any intention of excluding any holding company from using the mails in violation of the Act, at least before the validity of the Act is judicially determined by the Supreme Court and by a letter of that date instructed all postmasters to act accordingly. Exhibit 4 is a copy of such letter." (Vol. II, p. 272.)

"10. *The Commission and the Members of the Commission.*

* * * * * *

B. The Commission has not, nor have the Members of the Commission, instituted or threatened to institute or requested the Attorney General or any United States Attorney to institute any civil or

criminal proceedings against the defendants or any of them, or any of their directors, officers, agents or employees for any violation of the Act, except that the Commission has instituted this proceeding against certain of the defendants for the relief prayed in the amended and supplemental bill of complaint herein. Neither the Commission nor the Members of the Commission will institute or request the Attorney General or any United States Attorney to institute any further civil or criminal proceedings against the defendants or any of them, or any of their directors, officers, agents, or employees, at least until such time as the constitutionality of Sections 4 and 5 of the Act has been finally adjudicated in this proceeding. In the event that Sections 4 and 5 of the Act are adjudicated to be constitutional in this proceeding, neither the Commission nor the Members of the Commission will request the Attorney General or any United States Attorney to prosecute the defendants or any of them, or any of their directors, officers, agents or employees for any violation of the Act which occurred prior to the date of such adjudication. On November 22, 1935, the Commission publicly announced, by means of a written press release delivered to the newspapers and press services, that, at least for the immediate future and until further notice, the Commission did not intend to make any recommendations to or requests upon the Department of Justice for the institution of proceedings to enforce criminal liabilities under the Act. Exhibit 6 is a copy of such press release." (Vol. II, pp. 273, 274.)

Stipulation—Exhibit 2

Circular to United States Attorneys

DEPARTMENT OF JUSTICE
Washington, D. C.

November 21, 1935.

CIRCULAR No. 2780

To All United States Attorneys

The Public Utility Holding Company Act of 1935 makes specified transactions by the use of the mails or instrumentalities of Interstate Commerce illegal for certain public utility holding companies after December 1, 1935, unless such companies are registered with the Commission.

The Edison Electric Institute, a trade organization, whose membership includes a number of utility holding companies, has announced that it has retained counsel to contest the constitutionality of the Act. Consequently, it is probable that a number of companies will fail to register under the Act.

It is, of course, not the purpose of the Government to harass the utility industry with a needless multiplicity of suits. Equally, however, there is no public interest to be served by vexing the Government with a multiplicity of injunction suits which might embarrass and harass the Government in defending the constitutionality of the Act and which might result in the presentation of the issue of constitutionality on the basis of an inadequate record or a record not fairly typical of the situations covered by the Act.

Section 18 of the Act places the duty of investigating violations of the Act upon the Securities and Exchange Commission, which may transmit evidence "to the Attor-

ney General, who, in his discretion, may institute the appropriate criminal proceedings."

In enforcing the Act it is proposed promptly to institute civil proceedings against one or more large and important companies who may fail to register to enforce compliance with its provisions and to seek decisions from the Supreme Court sustaining the validity of the Act. In the meanwhile it is not proposed to institute criminal proceedings, and if later it should become necessary to institute criminal proceedings against any company, it is not the intention of this department to seek to exact penalties for earlier offenses which might unduly penalize the investors in the offending company.

In view of the foregoing, the Department suggests that you refrain from bringing or threatening to bring any criminal proceedings under the Act. If any injunction proceeding is instituted against you, you will thus be in a position to disclaim any present threat of any criminal proceeding under such Act. Such disclaimer should be sufficient to dispose of any restraining order which may be sought against you under the authority of *Spielman Motor Sales Co.* v. *Dodge*, 295 U. S. 89, decided April 29, 1935; *Sparks* v. *Mellwood*, 74 F. (2d) 695 (C. C. A. 6th, 1934); *Richmond Hosiery Mills* v. *Camp*, 74 F. (2d) 200 (C. C. A. 5th, 1934); *Campbell* v. *Medalie*, 71 F. (2d) 671 (C. C. A. 2d, 1934); *McKee* v. *Rudolph*, 12 F. (2d) 148 (C. A. D. C., 1926); *Cave* v. *Rudolph*, 287 F. 989 (C. A. D. C., 1923).

You will promptly inform this Department, nevertheless, of any action which may be instituted in your District, whether or not you are made a party, to attempt to test the validity of the Act.

HOMER CUMMINGS,
Attorney General.

(Vol. IV, pp. 641-643.)

Stipulation—Exhibit 3

Circular to United States Attorneys

DEPARTMENT OF JUSTICE
Washington, D. C.

December 7, 1935.

CIRCULAR No. 2786

To All United States Attorneys

1.) In Circular No. 2780, November 21, 1935, you were advised that the Government would promptly institute civil proceedings to enforce compliance with the Public Utility Holding Company Act of 1935; that in accordance with the discretion vested in the Attorney General under section 18(f) of that Act, the Attorney General would not sanction the institution of criminal proceedings for violations of the Act before the validity of the Act was judicially determined by the Supreme Court, nor would he thereafter sanction the exaction of penalties for prior offenses; and that you should refrain from bringing or threatening to bring any criminal proceedings under the Act.

2.) On November 26, the Government instituted a civil suit in the Southern District of New York against Electric Bond and Share Company and five of its principal subsidiary holding companies to enforce compliance with the Act, and shortly thereafter consented to the intervention in that suit of sixteen additional subsidiary holding companies in the Electric Bond and Share system. The major issues concerning the constitutionality of the Act, in so far as such issues may legally be raised at this time, will be promptly, effectively, and fairly tested and adjudicated in this suit.

3.) The Attorney General and the Securities and Exchange Commission have taken the position, on the authority of *Union Pacific R. R. Co.* v. *Public Service Commission,* 248 U. S. 67; *Terral* v. *Burke Construction Co.,* 257 U. S. 529; *Power Manufacturing Co.* v. *Saunders,* 274 U. S. 490, that registration does not constitute a waiver of any constitutional rights. In its Holding Company Act, Release No. 22, November 22, 1935, the Securities and Exchange Commission reiterated that "the Commission under its rule-making power expressly permits the registrant to reserve his constitutional rights," and further announced that "the Commission is prepared to go further and accept a notification that expressly stipulates that the notification of registration will at the option of the registrant be deemed void if registrant's reservation of its constitutional rights is adjudged void or ineffective."

4.) Despite the efforts of the Government to test the validity of the Act in an orderly and economical manner, and in the meanwhile to safeguard every legal and constitutional right of the private interests affected, not only have a multitude of unnecessary suits been brought against government officials, but a number of stockholders' suits have been brought against various companies with a view to testing the constitutionality of the Act in proceedings in which the Government or its officers are not even parties. In light of the action taken by the Government to safeguard the rights and interests of both registering and non-registering companies, it may be questioned whether such stockholders' suits are brought in good faith and are free from collusion as is required under Equity Rule 27 as interpreted by the Supreme Court. *Corbus* v. *Gold Mining Co.,* 187 U. S. 455; *Wathen* v. *Jackson Oil & Refining Co.,* 235 U. S. 635. It is true that there are cases where in the absence of collusion a stockholder has been allowed to sue

to enjoin the payment of an allegedly unconstitutional tax where the company is threatening to pay the tax without protest and thereby (under the law then in force) threatening to deprive itself of any opportunity of subsequently recovering the tax. *Pollock* v. *Farmers Loan & Trust Co.*, 157 U. S. 429; *Brushaber* v. *Union Pacific Railroad Company*, 240 U. S. 1. But such cases are not at all comparable to an action by a stockholder to enjoin the simple act of registration which involves no waiver of any constitutional right. The only other cases where such stockholders' suits have been permitted, *Smith* v. *Kansas City Title and Trust Co.*, 255 U. S. 180, and *Hill* v. *Wallace*, 259 U. S. 44, are similarly inapplicable, for in each, if the statute challenged were unconstitutional, the action of the Directors sought to be enjoined was unlawful under state law or a clear abuse of their powers of management.

5.) The Government takes the position that any action by a stockholder to enjoin or to compel registration cannot bring into issue the question of constitutionality, but at most only the question of the good faith and prudent conduct of the management. The Government at the present time does not plan to intervene or take any part in any action brought by a stockholder to test the constitutionality of the Act.

6.) Inasmuch as it will in many cases be impossible for the District Attorneys to know of the existence of these suits, you are requested to bring this circular to the attention of the Circuit Judges in your circuit and to the District Judges in your district so that they may be apprised of the Government's position in the event that any such stockholders' suits come before them.

HOMER CUMMINGS,
Attorney General.

(Vol. IV, pp. 644-647.)

Stipulation—Exhibit 4

Circular to Postmasters

OFFICE OF THE POSTMASTER GENERAL,

Washington, December 4, 1935.

The Public Utility Holding Company Act of 1935 makes it unlawful for certain holding companies to use the mails for specified purposes after December 1, 1935, unless such companies are registered with the Securities and Exchange Commission. It is probable that a number of such holding companies will not register under the act.

The Attorney General in Department of Justice Circular No. 2780, sent to all United States attorneys on November 21, 1935, and the Securities and Exchange Commission in its Holding Company Act, Release No. 22 of November 22, 1935, have announced that it is not the intention of the Government to institute criminal proceedings under the act pending the authoritative adjudication of civil proceedings which will promptly be instituted by the Government under section 18 (f) of the act against one or more representative companies to compel compliance with the act.

Whatever may be the authority, if any, of the Postmaster General to exclude from the mails matter sent in violation of the act, the Postmaster General does not intend to exclude any company from using the mails, at least not before the validity of the act is judicially determined by the Supreme Court. You will accordingly take no steps to exclude unregistered holding companies from the use of the mails.

JAMES A. FARLEY,
Postmaster General.

(Vol. IV, p. 648.)

Stipulation—Exhibit 6

Press Release of the Commission

Nov. 22, 1935

The Securities and Exchange Commission today officially authorized the issuance of the following statement:

(1) The Public Utility Holding Company Act of 1935 makes specified transactions by the use of the mails or instrumentalities of Interstate Commerce illegal for certain public utility holding companies after December 1, 1935, unless such companies are registered with the Commission. To date the number of notifications of registration filed under the Act has been negligible. The Edison Electric Institute, a trade organization, whose membership includes many public utility holding companies subject to the Act, has announced that it has retained counsel to contest the constitutionality of the Act.

(2) Section 18 of the Act authorized the Commission to enforce compliance with the Act. And it is the purpose of the Commission to proceed promptly with the administration and enforcement of the law.

(3) However, it is the purpose of the Commission to proceed with the enforcement of the Act in an orderly and economical manner. The Commission will not harass the industry with a multiplicity of suits. And the Commission will resist any effort that may be made to vex the Government with a multiplicity of suits or to provoke litigation with a view of presenting the issue of constitutionality on the basis of an inadequate record or a record not fairly typical of the situations covered by the Act.

(4) If there is a general failure to register under the Act, the Commission will proceed promptly to bring civil proceedings against one or more large and important companies who may fail to register to enforce compliance with the Act and to seek decisions from the Supreme Court sustaining its validity. In the meanwhile, at least for the immediate future and until further notice, the Commission does not intend to make any recommendations to or requests upon the Department of Justice for the institution of proceedings to enforce criminal liabilities under the Act. The Commission understands that the Attorney General has sent a circular to District Attorneys setting forth the attitude of the Department of Justice.

(5) Counsel for the Commission is firmly of the opinion that registration does not constitute a waiver of any constitutional right which the registering company may have. And the Commission under its rule-making power expressly permits the registrant to reserve his constitutional rights. The Commission is prepared to go further and accept a notification that expressly stipulates that the notification of registration will, at the option of the registrant, be deemed void if registrant's reservation of its constitutional rights is adjudged void or ineffective. No possible ground in reason remains for any company to fail to file a simple notification and registration under these circumstances as a sheer precautionary matter for the protection of its investors. (Vol. IV, pp. 650, 651.)

Excerpts From Amended and Supplemental Complaint

"XVIII

That the defendant Electric Bond and Share Company, in the ordinary course of its business, by constant use of the mails or means or instrumentalities of interstate commerce, in its own name or through Ebasco Services, Incorporated, is and will be continuously engaged in taking steps in the performance of its existing service contracts with the utility companies in the Electric Bond and Share System. That in such contracts, defendant Electric Bond and Share Company, in its own name or through Ebasco Services, Incorporated, for an agreed rate of compensation based upon total monthly operating revenues, undertakes to render extensive services, and the operating public utility agrees to accept such services and to pay for the same. That more specifically such contracts provides:" (Vol. I, p. 42.)

[Here follow paragraphs XIX to XXIII, inclusive, pp. 42 to 62, describing in detail the services rendered, concluding with the allegation on page 62 as follows:]

"That the performance for compensation of the services described in this paragraph constitutes a business in interstate commerce, and that defendant Electric Bond and Share Company, both in its own names and through its wholly owned subsidiaries Ebasco Services, Incorporated, and Phoenix Engineering Corporation, although not registered under the Act, will continue to engage in such business in interstate commerce in violation of Section 4(a)(5) of the Act."

Excerpts From Answer of Defendants Electric Bond and Share Company, American Power & Light Company, and Others (Counterclaim and Cross-Bill)

"42. In the course of their business, defendant Bond and Share and its subsidiary service company, Ebasco Services Incorporated, and the holding company and operating company defendants use the United States mails and the facilities of commerce for various lawful purposes, including the transportation of their officers and employees and the transmission of lawful matter affecting the business of said companies and not in any way tending to impair the safety, health or morals of any person; said matter does not endanger the mails or the facilities of transmission thereof or the facilities of commerce, nor is such matter calculated to, nor does it, defraud or otherwise injure or offend the sender or recipient thereof, or any other person or corporation, directly or indirectly." (Vol. I, p. 157.)

[Here follow quotations from the Act, and the following:]

"The activities forbidden by paragraphs (3), (4) and (6) of said Section 4(a) are essential to the normal and ordinary conduct of the business of each of the defendants and the use, conversation (*sic* error for "conservation") and development of its properties. It is essential and necessary that each of the defendants, to maintain the integrity of its property and investments, own, control and hold with power to vote, the securities of its subsidiary companies which do the things prohibited in paragraphs (1) to (5), inclusive, of said Section 4(a) as and to the extent hereinbefore alleged." (Vol. I, p. 159.)

* * * * * *

"An unregistered holding company which engages in any of the transactions prohibited by Section 4(a) is within the purview of the following provisions of Section 26(b):

[Quoting Section]

"Each of the defendants has existing many contracts, relationships and practices, the performance of which involve violations of provisions of said Act, and which may also be subjected to rules, regulations or orders of plaintiff Commission which would likewise be violated. Among such contracts and relationships are those between defendant Bond and Share's wholly-owned subsidiary, Ebasco Services Incorporated, and others of the defendants and their subsidiaries for the performance of services, and like arrangements between defendant American Gas and its subsidiaries. Such contracts and relationships are of value to the parties thereto, and their termination would result in monetary losses, and losses in economy and efficiency of operation." (Vol. I, pp. 161, 162.)

* * * * * *

"(6) The provisions of Section 4(a)(2) and (6) of said Act which prohibit defendants Bond and Share and American Gas, as unregistered holding companies, by use of the mails or any means or instrumentality of interstate commerce, from taking any step in the performance of any service, sales or construction contract or from owning securities of any subsidiary company taking any such step and the provisions of Section 13(a) and (b) of said Act which prohibit said defendants after April 1, 1936, from taking directly any step in the performance of any such service, sales or construction contract or from taking any such step through a subsidiary company except at cost, and then only in accordance with terms, conditions and limitations prescribed by plaintiff Commission, destroy contract rights, presently threaten to disrupt and de-

stroy the valuable service organizations now maintained by said defendant American Gas and by defendant Bond and Share's wholly-owned subsidiary company, Ebasco Services Incorporated, and will deprive said defendants of their property without due process of law in violation of the Fifth Amendment to the Constitution of the United States." (Vol. I, pp. 181, 182.)

[The Cross-Bill concludes with a prayer for injunctions, both temporary and permanent, against the enforcement of the Act or any of the provisions thereof (Vol. I, pp. 198-200).]

Excerpt From Reply of Securities and Exchange Commission, Its Members, Attorney General and Postmaster General to Cross-Bill

"Plaintiff and cross-defendants deny that the Attorney General threatens or intends to institute criminal proceedings against the defendants or any of them, and deny that the Postmaster General intends or threatens to prevent the defendants from using the mails in the conduct of their business, but allege, on the contrary, that it is the intention of the Securities and Exchange Commission and the Attorney General and Postmaster General to institute no proceedings of any kind or nature whatsoever against the defendants or any of them or their officers, directors or employees to enforce the provisions of Section 4(a) of the Act or of any other section of the Act other than the proceeding instituted by the plaintiff herein, until such time as the Supreme Court of the United States shall have determined the constitutionality of said Act in this proceeding." (Vol. I, p. 251.)

Excerpts From Findings of Fact and Conclusions of Law of District Court

"64. Other than sections 4(a) and 5(a), the provisions of the Act (with minor exceptions not material to this cause) apply only to registered holding companies and their subsidiary companies. Each defendant is a non-registered holding company, and as such, no provision of the Act, other than the provisions of sections 4 and 5(a) of the Act, is applicable, can be applied, or has been threatened by the plaintiff or any cross-defendant or any other officer or agency of the United States, to be applied to any of them.

"65. The filing by the plaintiff of its bill of complaint in this proceeding and its prosecution of this proceeding constitute the sole act, conduct, or threat by the plaintiff or any cross-defendant or any other officer or agency of the United States to enforce the Act or any part thereof or any rule, regulation, or order thereunder against the defendants or any of them or against any subsidiary company or affiliate of any defendant, or any director, officer, employee, or agent of any defendant. Such act, conduct, and threat are solely in respect of the civil enforcement of the provisions of sections 4(a) and 5 of the Act and of the rules and regulations thereunder against the thirteen defendants; and they do not constitute any act, conduct, or threat to enforce, or to exact or inflict any penalty for the violation of, any other provision of the Act or any rule, regulation, or order thereunder. The defendants are in no danger at the hands of the plaintiff or the cross-defendants, or any of them, before a final decision by the Supreme Court—the plaintiff and each of the cross-defendants having made public announcement (prior to and at about the time of the commencement of this proceeding) and having stipulated therein that no steps would be taken, until a final decision by the Supreme

Court, because of failure to comply with the Act, and that even after such decision no penalties would be sought for earlier offenses; all as specifically set forth in the stipulation of facts (R. 641-651). The Court takes judicial notice of the fact that the plaintiff Commission has made a number of rules, regulations and orders applicable to registered holding companies and their subsidiaries including regulations regarding a system of accounts and regulations regarding service, sales, and construction contracts. But neither the plaintiff Commission nor the cross-defendants have taken or threatened any civil or criminal proceedings against any registered holding company or any subsidiary company thereof for failure to comply with the provisions of the Act, or any rule, regulation, or order thereunder applicable to registered holding companies or subsidiary companies thereof.

"66. The defendants have offered no evidence to support a finding, and the record is without any facts which could support a finding, that any defendant or any subsidiary company of any of them has suffered or is suffering any irreparable or substantial damage, impending or threatened, by reason of any act, conduct, or threat of the plaintiff or any cross-defendant or any other officer or agency of the United States, or by reason of the existence of the Act or any provision thereof or any rule, regulation, or order thereunder. Until the provisions of the Act other than sections 4(a) and 5 become applicable to the defendants, neither they nor their subsidiary companies show any irreparable or substantial injury, impending or threatened. * * *" (Vol. VIII, pp. 2249-2251.)

* * * * * *

"18. In so far as the cross-bill attempts to raise any issue in respect of, or seeks any relief from, the provisions of the Act applicable to non-registered holding companies (i.e., sections 4(a) and 5),

the issues have been determined on the bill of complaint and the answer thereto; and the defendants and intervening defendants have no need, and are not entitled, to a determination of any such issue on the cross-bill." (Vol. VIII, p. 2258.)

* * * * * *

"20. In so far as the cross-bill attempts to raise any issue regarding the provisions of the Act applicable solely to registered holding companies, the cross-bill must be dismissed because there has been no threat or act by the plaintiff or any cross-defendant to enforce any such provision of the Act against any defendant or any intervening defendant, and there is no danger or justifiable fear of any such threat or act. In these circumstances, the defendants and intervening defendants fail to make out any case or controversy with the plaintiff or any cross-defendant regarding any such issue." (Vol. VIII, pp. 2258-2259.)

Excerpts From Opinion of District Court

"We come then to the question of the validity of the registration provisions, that is, of secs. 4(a) and 5. They are unconstitutional, defendants contend, because they are not a regulation of interstate commerce or of the mails. The argument is that the information required to be filed under sec. 5 has no relation to and will not constitute a regulation of the acts forbidden to unregistered holding companies by sec. 4(a). It is further contended that some of the acts forbidden by sec. 4(a) do not constitute interstate commerce.

"The question is as to the power of Congress to forbid public utility holding companies to do the acts enumerated in sec. 4(a) unless they first register and file the information required of registered companies by sec. 5.

> "*Although subsidiaries which themselves are not holding companies are not forbidden to do any of the acts enumerated, holding companies of subsidiaries which commit those acts are made responsible therefor by sec. 4(a) (6).* Such acts of subsidiaries are thus material in considering the validity of paragraph (6)." (Emphasis supplied.) (Vol. VIII, p. 2191.)

* * * * * *

Here follows a discussion seriatim of the different paragraphs of Section 4(a) (pp. 2191-2207) and of the activities of the defendants thereunder, including the services of Ebasco Services Incorporated to operating subsidiaries of the Bond and Share System, concluding as follows:

> "Sec. 4(a) (6) forbids unregistered holding companies 'to own, control, or hold with power to vote, any security of any subsidiary company thereof that does any of the acts enumerated in paragraphs (1) to (5), inclusive, of this subsection.' Inasmuch as paragraph (5) is not involved in this case, the question is whether Congress may validly require registration by and information from holding companies if any of their subsidiaries do any of the acts enumerated in paragraphs (1) to (4), acts which it may constitutionally forbid to be done by the holding companies themselves. Sec. 2(a) (7) defines a holding company as 'any company which directly or indirectly owns, controls, or holds with power to vote, 10 per centum or more of the outstanding voting securities of a public-utility company or of a company which is a holding company'. But a company holding the prescribed percentage of stock in another company may apply to the Commission for an order that it is not a holding company, and the Commission must so declare if it 'finds that the applicant (i) does not, either alone or pursuant to an arrangement or understanding with one or more

other persons, directly or indirectly control a public-utility or holding company either through one or more intermediary persons or by any means or device whatsoever, (ii) is not an intermediary company through which such control is exercised. * * *' Corresponding provisions are made as to subsidiary companies, in sec. 2(a) (8). Not only have defendants not applied for exemptions under these provisions, but they assert in their answer that they are not entitled to apply for exemptions. It is therefore admitted, for the purposes of the Act, that defendant holding companies control their respective subsidiaries.

"Paragraph (6) is an essential part of the regulations in the registration provisions, if the other paragraphs of sec. 4(a) are to have any appreciable effect. Without it, it is only necessary for any holding company to transfer its activities to its subsidiaries in order to escape the regulations. A good example of how this might be done is provided in the organization of Ebasco, and the transfer of its service contracts and facilities by Bond and Share to this 100% owned subsidiary. As to the activities normally carried on by subsidiaries, it is entirely reasonable that a controlling holding company be made responsible for them. When there is control, as admittedly prevails here, it is the holding company which in any real sense, causes the activities to be carried on. The statute thus but recognizes and gives effect to the practical situation. In *Federal Trade Com.* v. *Smith, supra,* a public utility holding company was held to be engaged in interstate commerce and therefore subject to federal regulation because of its control of its subsidiaries. The problem of disregarding or piercing through the corporate entities is not here involved; the Act, without denying the separateness of the corporations as such, charges the holding company with responsibility for those interstate activities which, by virtue

of control, it causes the subsidiary to engage in." (Vol. VIII, pp. 2207-2209.)

* * * * * *

"As a basis for injunctive relief, irreparable injury must be shown to be impending or threatened. *Spielman Motor Sales Co.* v. *Dodge,* 295 U. S. 89 (1935). But until the Act becomes applicable to cross-plaintiffs, they show no such injury. The provisions of the Act other than the registration requirement apply only to registered companies.

"Although the decree to be entered, directing a cessation of the activities forbidden by sec. 4(a) until registration, will, if ultimately sustained, probably result in registration, some months at least will necessarily elapse before this is done. The stipulation recites that each defendant which is a holding company is violating 'one or more provisions of sec. 4(a) of the Act, and, unless otherwise ordered by a final decree not thereafter reversed or vacated, intends to continue, without registering, to engage in such activities and transactions'. Since the defendants intend to secure a review of these proceedings, it is clear that they will not register unless and until they are required so to do by decision of the Supreme Court. Therefore, the regulations pertaining to registered holding companies will not affect them for at least some time.

"Cross-plaintiffs are in no danger at the hands of cross-defendants or any of them before a final decision by the Supreme Court; there has been public announcement that before such decision, no steps would be taken because of failure to comply with the Act and that penalties will even then not be enforced or action leading thereto taken by any of cross-defendants, because of the earlier failure to comply therewith." (Vol. VIII, pp. 2211, 2212.)

Excerpts From Opinion of Circuit Court of Appeals, 92 F. (2d) 580, at Page 591

"By Section 4(a)(6) an unregistered holding company may not lawfully own, control or hold with power to vote, any security of any subsidiary company thereof that does any of the acts enumerated in paragraphs 1 to 5, inclusive, of this subsection. A ten per cent. stock ownership creates a presumption of control. The Act provides (§ 2(a)(8)) that the Commission upon application shall declare a company not to be a subsidiary company if it finds that it in fact is not controlled by the holding company. By Section 2(a)(7) [fol. 2335] any company that is prima facie a holding company under the Act can rebut the presumption by showing that in fact it does not control subsidiary utility companies. The presumption provided for is neither arbitrary nor unreasonable as Congress could find upon the report of the Federal Trade Commission.* Practical control is often exercised and retained, through the ownership by those who are already in managerial control of a substantial minority of the voting power. The majority stock is not necessary for control. United States *v.* Union Pac. Ry. Co., 226 U. S. 61, 95-96.

"By Section 4(a)(6) Congress has not attempted to disregard the corporate entity of any corporation. The provisions of the Act which regulate the relations between the holding company and its subsidiary take into full account the existence, separation and protection of such entities. Congress has found that in certain situations the proper regulation of interstate commerce and postal activities of the subsidiary requires the regulation of the controlling company. 'It is with the system that the law must deal, not with its elements.' So. Pac. Terminal Co. *v.* I. C. C., 219 U. S. 498, 523." (Record in Supreme Court, pp. 2329-2330.)

* 70th Congress, First Session, Senate Document 92, para. 72-a, p. 143.

Excerpts From Briefs Filed in the Supreme Court on Behalf of Securities and Exchange Commission, the Attorney General of the United States and the Postmaster General of the United States

"If defendants believe that the registration provisions of the Act are unconstitutional, it is their privilege—and they have exercised it—to refrain from voluntary compliance. By their decision defendants have made it possible for themselves and their subsidiaries to sell securities, to acquire securities and utility assets, to perform service, sales, and construction contracts, to make 'upstream loans,' to engage in other intra-system transactions, and to keep their accounts in any manner which they see fit without running afoul of the provisions of sections 6 to 15, and without fear of the taint of illegality which section 26 might otherwise cast upon such transactions. But, having deliberately chosen to insulate themselves for a substantial period of time from the application of the very provisions of the Act which they now seek to attack in their cross-bill, surely defendants cannot be heard to complain if the result has also been to prevent any justiciable controversy over such provisions from arising." (Brief for Respondents, Securities and Exchange Commission, et al., pages 208-209.)

* * * * * *

"V. DEFENDANTS' THREATENED VIOLATIONS OF SECTIONS 4(a)(1),(2),(3),(4), AND (6)

"For the convenience of the Court, we summarize briefly the acts done or threatened by each of the several defendants which constitute violations of section 4(a) as found by the District Court.

* * * * * *

"2. SECTION 4(a)(2) AND (6)

"Bond and Share directly owns securities of its subsidiary companies Ebasco and American Gas, which by use of the mails and channels of interstate commerce perform service, sales, and construction contracts for public-utility companies (R. 2237-2245, findings 50-56). The services now being performed by these three subsidiaries have already been described in this Factual Summary (pp. 75-101, 108-122, *supra*). Bond and Share is continuously violating section 4(a)(6) by reason of the fact that these subsidiary companies are continuously doing the acts described in section 4(a)(2)." (Appendix B to Brief for Respondents, Securities and Exchange Commission, et al., pages 122-123.)

[Statements in almost identical language also appear in the briefs filed on behalf of Securities and Exchange Commission, the Attorney General and the Postmaster General both in the Circuit Court of Appeals and in the District Court.]

Stipulation Dated March 31, 1938, Made in the District Court After the Decision of the Supreme Court in *Electric Bond and Share Company* v. *Securities and Exchange Commission*

[Title of Court and Cause]

Whereas this cause was instituted by the Securities and Exchange Commission in the United States District Court for the Southern District of New York for the purpose of procuring final adjudication by the Supreme Court of the United States of the constitutionality of the Public Utility Holding Company Act of 1935 (hereinafter sometimes called the "Act") or such part thereof as might be presently presented for such final adjudication, and in an effort to present the constitutionality of the entire Act, the defendants herein filed a cross-bill against the above named Attorney General of the United States, Postmaster General of the United States and individual members of the Securities and Exchange Commission; and

Whereas in order to avoid the necessity of multiplicity of suits, preliminary injunctions and procedural embarrassments, the Attorney General of the United States, the Postmaster General of the United States and the members of the Securities and Exchange Commission publicly announced prior to the bringing of this suit, and stipulated herein (stipulation of facts, record, Article III, pp. 271-277) that they would not institute or request the institution of civil or criminal proceedings against the defendants or any of them or against their directors, officers, agents or employees for any violation of the Act committed by them or any of them prior to the date of the final adjudication of the constitutionality of Sections 4 and 5 of the Act; and

WHEREAS by decree of the said District Court entered herein on the 6th day of March, 1937, the cross-bill of the defendants was dismissed, and an injunction was allowed against each of certain of the defendants therein named as prayed for in plaintiff's amended and supplemental bill of complaint "commencing on the thirtieth day after the day of this decree and continuing until such defendant shall cease to be a holding company as defined in section 2(a) (7) of the Public Utility Holding Company Act of 1935 or shall register with the plaintiff as provided in sections 4(a) and 5(a) of said Act"; and

WHEREAS it was further provided in said decree that if an appeal should be taken prior to the effective date of said injunction "the said injunction shall be stayed as to the appealing defendants without further bond or supersedeas order, pending the determination of said appeal either by the Circuit Court of Appeals or by the Supreme Court of the United States, if it shall be there removed by certiorari or other process, and until thirty days after filing of the mandate of the appellate court in this Court"; and

WHEREAS it was the intention of the parties expressed through their counsel in framing said decree to allow to certain defendants a period of thirty days after the entry of judgment on the mandate of the Supreme Court of the United States by the District Court to accomplish registration, as in effect required by said decree, in an orderly manner, without subjecting any of the defendants, or any of their directors, officers, agents or employees to contempt proceedings for violation of the injunction, or to civil or criminal proceedings for violations of the Act committed before the termination of said period of thirty days; and

WHEREAS a question has arisen as to the meaning of the term "final adjudication" or equivalent terms as used in Article III of the stipulation of facts as above referred to

and the construction of the decree in connection with said stipulation;

THEREFORE, it is hereby stipulated and agreed by and between the plaintiff and cross-defendants through their counsel that the term "final adjudication" or equivalent terms as used in said Article III of said stipulation shall be construed as referring to the effective date of the injunction provided for in the decree, to wit, thirty days after the entry of the judgment by the United States District Court for the Southern District of New York upon the mandate of the Supreme Court of the United States, and that there shall not be instituted civil or criminal proceedings against the defendants or any of them, or against their directors, officers, agents or employees or any of them, for any violation of the Act committed by them or any of them prior to the expiration of thirty days from the entry of said judgment upon said mandate.

It is further stipulated and agreed that defendants waive the issuance of a writ of injunction on the decree, and said decree shall be fully effective and binding on defendants subject thereto, according to its terms, without the issuance of such writ.

This stipulation may be filed in the District Court for the Southern District of New York in connection with the entry of the judgment on the mandate and shall have the same effect as if incorporated in said judgment or in the decree in this cause.

Dated, March 31, 1938.

ROBERT H. JACKSON
Solicitor for Plaintiff and Cross-Defendants

SIMPSON THACHER & BARTLETT

JOHN F. MACLANE
Solicitor for Defendants

Excerpts From Public Utility Holding Company Act of 1935

"Section 4. (a) After December 1, 1935, unless a holding company is registered under section 5, it shall be unlawful for such holding company, directly or indirectly—

(1) to sell, transport, transmit, or distribute, or own or operate any utility assets for the transportation, transmission, or distribution of, natural or manufactured gas or electric energy in interstate commerce;

(2) by use of the mails or any means or instrumentality of interstate commerce, to negotiate, enter into, or take any step in the performance of, any service, sales, or construction contract undertaking to perform services or construction work for, or sell goods to, any public-utility company or holding company;

(3) to distribute or make any public offering for sale or exchange of any security of such holding company, any subsidiary company or affiliate of such holding company, any public-utility company, or any holding company, by use of the mails or any means or instrumentality of interstate commerce, or to sell any such security having reason to believe that such security, by use of the mails or any means or instrumentality of interstate commerce, will be distributed or made the subject of a public offering;

(4) by use of the mails or any means or instrumentality of interstate commerce, to acquire or negotiate for the acquisition of any security or utility assets of any subsidiary company or affiliate of such holding company, any public-utility company, or any holding company;

(5) to engage in any business in interstate commerce; or

(6) to own, control, or hold with power to vote, any security of any subsidiary company thereof that does any of the acts enumerated in paragraphs (1) to (5), inclusive, of this subsection."

"Section 20. * * *

(d) The Commission, by such rules and regulations or order as it deems necessary or appropriate in the public interest or for the protection of investors or consumers, may authorize the filing of any information or documents required to be filed with the Commission under this title, or under the Securities Act of 1933, as amended, or under the Securities Exchange Act of 1934, by incorporating by reference any information or documents theretofore or concurrently filed with the Commission under this title or either of such Acts. No provision of this title imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule, regulation, or order of the Commission, notwithstanding that such rule, regulation, or order may, after such act or omission, be amended or rescinded or be determined by judicial or other authority to be invalid for any reason."

"Section 26. * * *

(b) Every contract made in violation of any provision of this title or of any rule, regulation, or order thereunder, and every contract heretofore or hereafter made, the performance of which involves the violation of, or the continuance of any relationship or practice in violation of, any provision of this title, or any rule, regulation, or order thereunder, shall be void (1) as regards the rights of any person who, in violation of any such provision, rule, regulation, or order, shall have made or en-

gaged in the performance of any such contract, and (2) as regards the rights of any person who, not being a party to such contract, shall have acquired any right thereunder with actual knowledge of the facts by reason of which the making or performance of such contract was in violation of any such provision, rule, regulation, or order."

"Section 27. (a) It shall be unlawful for any person, directly or indirectly, to cause to be done any act or thing through or by means of any other person which it would be unlawful for such person to do under the provisions of this title or any rule, regulation, or order thereunder."

(33)

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IN THE

United States Supreme Court

OCTOBER TERM—1943

No. 1036 101

C. E. GROESBECK, C. V. GRAHAM, O. L. JOHNSTON, G. N. TIDD, E. P. SUMMERSON, H. L. ALLER, J. R. HOBBINS, ELECTRIC BOND AND SHARE COMPANY and EBASCO SERVICES INCORPORATED,

Petitioners,

and

S. R. INCH, A. S. GRENIER, C. F. KELLEY, S. A. MITCHELL, P. B. SAWYER, E. B. TRACY, H. T. WHITE, W. R. KENAN, W. V. GRIFFIN, L. H. PARKHURST, W. D. THORNTON, E. ERICSON, F. R. BAUER, J. W. FROST, D. W. JACK, NEBRASKA POWER COMPANY, NEW MEXICO ELECTRIC SERVICE COMPANY, NORTHERN POWER COMPANY, NORTHWESTERN ELECTRIC COMPANY, PACIFIC POWER & LIGHT COMPANY, INLAND POWER & LIGHT COMPANY, PORTLAND GAS & COKE COMPANY, SUPERIOR WATER, LIGHT AND POWER COMPANY, TEXAS ELECTRIC SERVICE COMPANY, TEXAS POWER & LIGHT COMPANY, TEXAS PUBLIC UTILITIES CORPORATION, THE WASHINGTON WATER POWER COMPANY, AMERICAN POWER & LIGHT COMPANY, CENTRAL ARIZONA LIGHT AND POWER COMPANY, FLORIDA POWER & LIGHT COMPANY, KANSAS GAS AND ELECTRIC COMPANY and THE MINNESOTA POWER COMPANY,

Defendants,

v.

DORA GOLDSTEIN,

Respondent.

PLAINTIFF-RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Counsel for Respondent,
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New York 16, N. Y.

APPEAL PRINTING CO., INC., 130 CEDAR ST., NEW YORK, WO 2-3512

INDEX

PAGE

THE COMPLAINT 2

A PREVIOUS ADJUDICATION BY THIS COURT 3

DEFENDANTS' STIPULATIONS WITH THE GOVERNMENT..... 4

THE DECISION BELOW 5

THE PETITION FOR CERTIORARI RAISES NO QUESTIONS CALLING FOR A REVIEW BY THIS COURT 6

POINT I—The service and construction contracts violate Section 4(a)(2) of the Utility Act, 15 U.S.C.A., Section 79d(a)(2) 9

POINT II—The service contracts are void pursuant to Section 26(d) of the Utility Act, 15 U.S.C.A., Section 79z(b) 12

POINT III—Plaintiff may compel the refund of the illegal service payments 14

POINT IV—The doctrine of *Ex parte Young* does not prevent recovery 15

POINT V—Petitioners' stipulations with the Government do not exempt them from civil liability..... 17

CONCLUSION 21

Table of Cases Cited

American Construction Co. *v.* Jacksonville, T. & K. W. R. Co., 148 U. S. 372, at 384 (1893) 6

Electric Bond and Share Company *v.* Securities and Exchange Commission, 303 U. S. 419 (1938), aff'g 92 F. 2d 580 (C.C.A. 2, 1937), aff'g 18 F. Supp. 131 (D.C., S.D.N.Y., 1937).....4, 5, 7, 8, 10, 15, 16

PAGE

Missouri P. R. Co. *v.* Tucker, 230 U. S. 340 (1913)....15, 16

Noble *v.* Carlton, 36 F. (2d) 967, at 969 (D.C., S.D. Fla., 1930) 16

Panama R. Co. *v.* Napier Shipping Co., 166 U. S. 280, at 284 (1897) 6

Weinberger *v.* Semenenko, 36 N. Y. Supp. 2d 396, at 406 (S. Ct., N. Y., 1942) 12, 17

Ex parte Young, 209 U. S. 123 (1908) 7, 15, 16

Statute Cited

Public Utility Holding Company Act:

Section 1(b)(2) 13
Section 2(a)(1), 15 U.S.C.A., 79b(a)(1)..... 11
Section 4 .....4, 7, 13, 14, 18, 19
Section 4(a) 10, 11, 12, 13, 15
Section 4(a)(2), 15 U.S.C.A., sec. 79d(a)(2) 3, 5, 8, 9, 10, 11
Section 5 .....18, 19
Section 5(a) 13
Section 18(f), 15 U.S.C.A., sec. 79r(f) 13, 14
Section 20 20
Section 20(d), 15 U.S.C.A., sec. 79t(d).....17, 20
Section 26(b), 15 U.S.C.A., sec. 79z(b)....5, 8, 12, 13, 14
Section 27 11
Section 27(a), 15 U.S.C.A., sec. 79z-1(a) 10, 11
Section 29, 15 U.S.C.A., sec. 79z-3 14

IN THE

Supreme Court of the United States

OCTOBER TERM—1943

No. 1036

C. E. GROESBECK, C. V. GRAHAM, O. L. JOHNSTON, G. N. TIDD, E. P. SUMMERSON, H. L. ALLER, J. R. HOBBINS, ELECTRIC BOND AND SHARE COMPANY *and* EBASCO SERVICES INCORPORATED,

Petitioners,

and

S. R. INCH, A. S. GRENIER, C. F. KELLEY, S. A. MITCHELL, P. B. SAWYER, E. B. TRACY, H. T. WHITE, W. R. KENAN, W. V. GRIFFIN, L. H. PARKHURST, W. D. THORNTON, E. ERICSON, F. R. BAUER, J. W. FROST, D. W. JACK, NEBRASKA POWER COMPANY, NEW MEXICO ELECTRIC SERVICE COMPANY, NORTHERN POWER COMPANY, NORTHWESTERN ELECTRIC COMPANY, PACIFIC POWER & LIGHT COMPANY, INLAND POWER & LIGHT COMPANY, PORTLAND GAS & COKE COMPANY, SUPERIOR WATER, LIGHT AND POWER COMPANY, TEXAS ELECTRIC SERVICE COMPANY, TEXAS POWER & LIGHT COMPANY, TEXAS PUBLIC UTILITIES CORPORATION, THE WASHINGTON WATER POWER COMPANY, AMERICAN POWER & LIGHT COMPANY, CENTRAL ARIZONA LIGHT AND POWER COMPANY, FLORIDA POWER & LIGHT COMPANY, KANSAS GAS AND ELECTRIC COMPANY and THE MINNESOTA POWER COMPANY,

Defendants,

v.

DORA GOLDSTEIN,

Respondent.

PLAINTIFF-RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The petitioner-defendants seek certiorari from an interlocutory decree of the Circuit Court of Appeals for the Second Circuit (142 F. 2d 422), which (1) upheld the jurisdiction and venue of the District Court for the Southern District of New York; (2) sustained the legal sufficiency of the complaint; and (3) remanded the case to the District Court for further proceedings (Record, pp. 104-112).

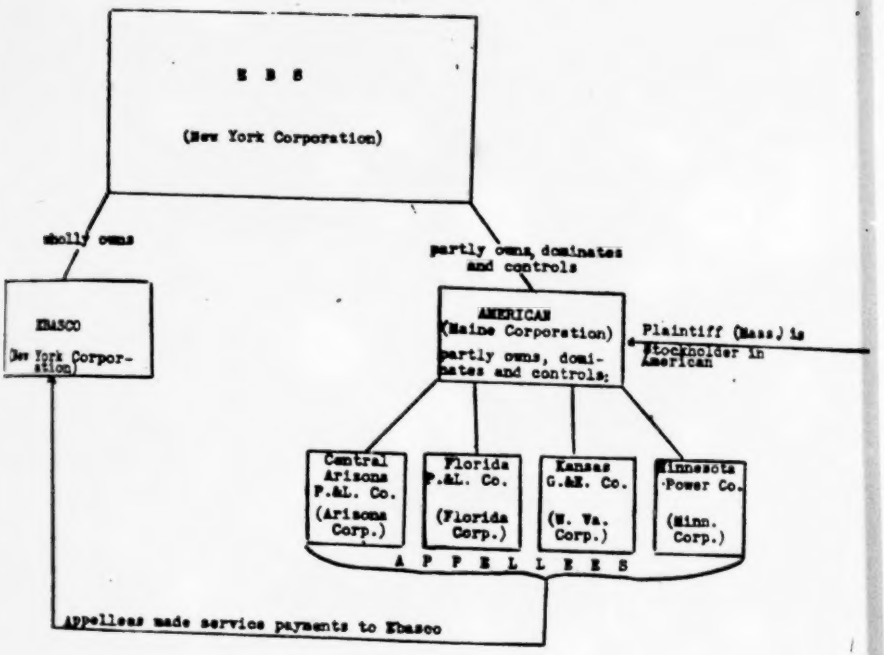
Petitioners do not attack those parts of the decision below which deal with jurisdiction and venue. But they contend that the complaint should have been dismissed for insufficiency. A brief statement of the first cause of action (the second and third have been withdrawn by stipulation) is therefore necessary. (Figures in parenthesis, unless otherwise indicated, refer to folios of the record.)

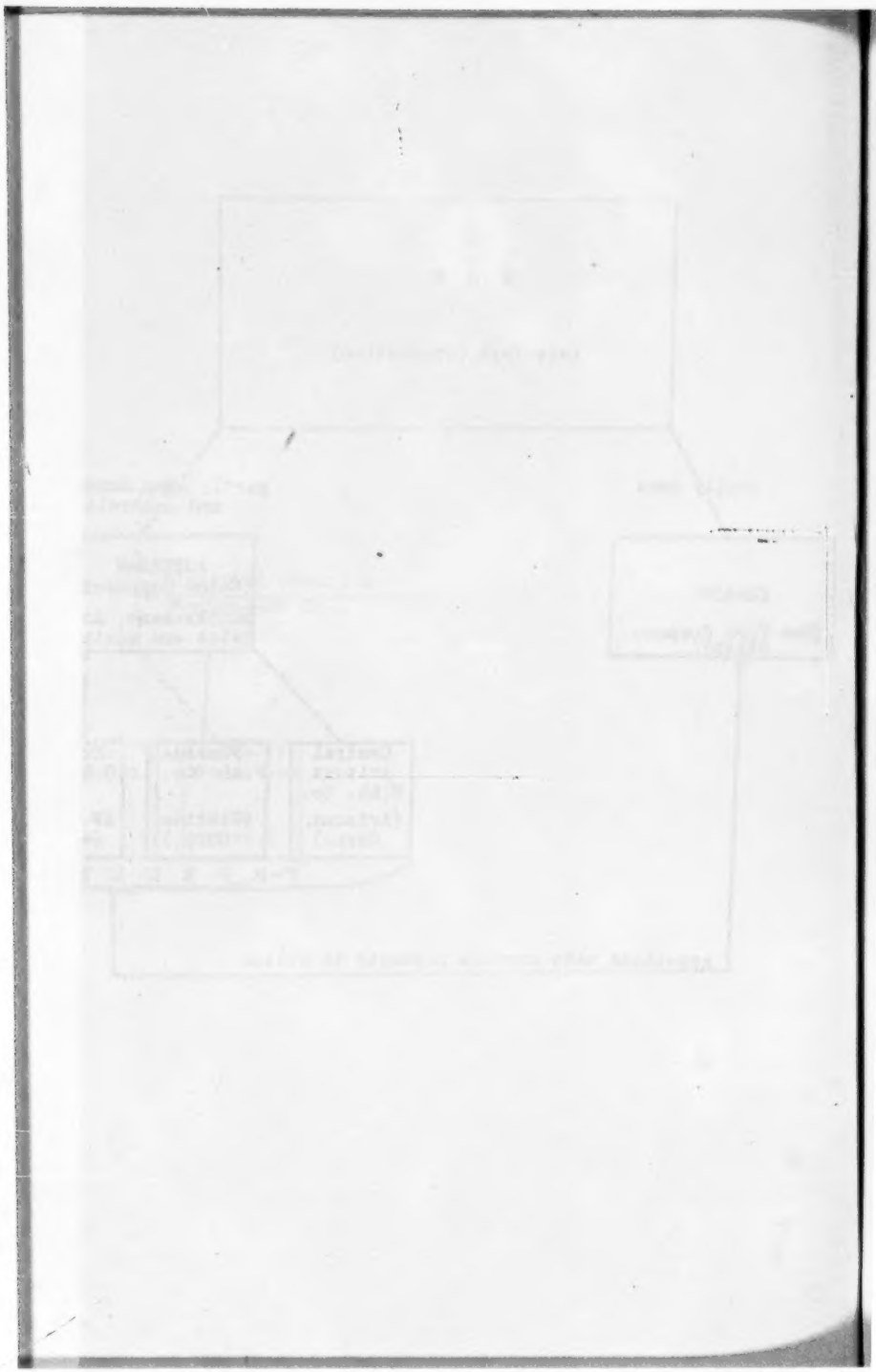
The complaint

Defendant Electric Bond and Share Company ("EBS" hereafter) is the top holding company of a large public utilities system (25-34). EBS owns a controlling stock interest in an intermediate holding company, the defendant American (of which plaintiff is a minority stockholder) (19, 29-30). American, in turn, owns controlling stock interests in a number of operating public utility companies named as defendants herein (the "operating companies" hereafter) (30, 31).

A chart showing the relationship and the domiciles of the corporate defendants is set forth on the opposite page.

EBS dominates and controls the management, personnel and business policies of American and American's operating subsidiaries (30-32).


E B S
(New York Corporation)
wholly owns
partly owns, dominates and controls
EBASCO
(New York Corporation)
AMERICAN
(Maine Corporation)
partly owns, dominates and controls
Plaintiff (Mass.) is stockholder in American
Central Arizona P.&L. Co. (Arizona Corp.)
Florida P.&L. Co. (Florida Corp.)
Kansas G.&E. Co. (W. Va. Corp.)
Minnesota Power Co. (Minn. Corp.)
A P P E L L E E S
Appellees made service payments to Ebasco



In the latter part of 1935 the defendants conspired to flout the newly enacted Public Utility Holding Company Act, 15 U.S.C.A., secs. 79a *et seq.*, by not registering with the Securities and Exchange Commission and by otherwise ignoring its provisions (44, 49, 38). More particularly, they resolved to circumvent Section 4(a)(2) of the Act, 15 U.S.C.A., sec. 79d(a)(2), which forbids unregistered holding companies to make or perform service or construction contracts with operating utility companies.

Pursuant to this conspiracy (44, 49), and only a few days before the effective date of the Utility Act (December 1, 1935), EBS organized two subsidiaries wholly owned and controlled by it, namely, the defendant Ebasco Services, Inc. ("Ebasco" hereafter), and Phoenix Construction Company (which was subsequently merged into Ebasco) (32-34, 45-77). EBS caused the operating companies to enter into service and construction contracts with Ebasco and Phoenix and to make substantial payments under these contracts to Ebasco and Phoenix (47, 50). These contracts and payments, effected through the mails and other means of interstate commerce (47), violated the Utility Act. They continued until April 1, 1938, at which time EBS finally registered with the S.E.C. (38).

This action seeks to recover the unlawful payments on behalf of the operating companies. Although plaintiff holds no stock in them, she is a stockholder of their parent, American (19). As such she brings this action "double derivatively" (R., p. 107).

A previous adjudication by this Court

Shortly after the service and construction contracts were made, the Securities and Exchange Commission brought suit to enjoin their performance on the ground

that they violated Section 4 of the Utility Act. The present defendants, who were also defendants in the injunction suit, counterclaimed to restrain the Government from enforcing Section 4, on the theory that it is unconstitutional. This Court sustained the Government; it affirmed the decisions of the lower courts granting the injunction sought by the S.E.C. and dismissing the counterclaim. *Electric Bond and Share Company* v. *Securities and Exchange Commission,* 303 U. S. 419 (1938), aff'g 92 F. 2d 580 (C.C.A. 2, 1937), aff'g 18 F. Supp. 131 (D.C., S.D.N.Y., 1937). That action will hereafter be referred to as the "EBS action".

This Court thus held in the EBS action:

(a) That Section 4 of the Utility Act is constitutional; and

(b) That the service and constructive contracts (the very contracts involved in the present suit) violate Section 4.

Defendants' stipulations with the Government

At or about the time the S.E.C. instituted the EBS action, it and other Government agencies entered into stipulations with the defendants to the effect,

(a) that pending the final adjudication of the constitutionality of Section 4 of the Utility Act, the Government would not institute civil or criminal proceedings against the defendants for violations of the Act; and

(b) that after a final adjudication sustaining the constitutionality, the Government would not institute criminal proceedings against the defendants for pre-judgment violations of the Act.

The petitioner-defendants invoke these stipulations as granting them immunity from this suit. The stipulations will be discussed in detail (*infra,* pp. 17-21).

The decision below

The Court below in the present case followed the decision of this Court in *Electric Bond and Share Co.* v. *S.E.C., supra,* and drew the inevitable consequences. In short, the Court below held (142 F. 2d 422):

1. The service and construction contracts violate Section 4(a)(2) of the Utility Act, 15 U.S.C.A., sec. 79d(a)(2). (R., pp. 109-110).

2. The contracts are void pursuant to Section 26(b) of the Utility Act, 15 U.S.C.A., sec. 79z(b). (R., p. 110).

3. The operating companies, having made substantial payments under these illegal contracts, are entitled to a refund. (The Court below did not decide whether this recovery should include the full amount of the payments or only that part which exceeded the value of the services rendered.) (R., p. 110).

4. Plaintiff, as a stockholder, may, on behalf of the operating companies, enforce their right to a refund. (R., pp. 107, 110-111).

5. Defendants' stipulations with the Government in the EBS action did not purport to preclude a private suit, such as this action. (R., p. 111).

The petition for certiorari raises no questions calling for a review by this Court

A. The present action, commenced on June 10, 1941 (3), has not progressed beyond the service of the summons and complaint. The decree below sustaining the sufficiency of the complaint is interlocutory. Certiorari "is and generally should be issued only after a final decree"; *Panama R. Co.* v. *Napier Shipping Co.*, 166 U. S. 280, at 284 (1897). It will not be granted from an interlocutory decree, "unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause"; *American Construction Co.* v. *Jacksonville, T. & K. W. R. Co.*, 148 U. S. 372, at 384 (1893). If certiorari is denied in this case, defendants will at long last have to answer the complaint. That is no extraordinary inconvenience.

B. The five questions presented by petitioners (Petition, pp. 3-5) are not of sufficient importance to warrant certiorari.

1. This case, say petitioners, involves the "integrity" of their stipulations with the Government in the EBS action. The stipulations, petitioners argue, granted them immunity regarding the violations of the Utility Act charged in the present suit. Petitioners claim that the decree below "effectively breaches" the stipulations (Pet., p. 3).

But the decree below had no such sinister intent or effect. The Circuit Court did not question the *integrity* of the stipulations, but their *interpretation* by petitioners. It held that "these agreements were simply that no governmental action would be taken against EBS, and did

not, as well as could not, cover the eventuality of private suit" (R., p. 111).

This Court will not grant certiorari merely to review the interpretation of an agreement by the Circuit Court.

2. Petitioners ask, as their second question, whether a stockholder, such as plaintiff, may "repudiate the action of the company in making the stipulation" by bringing the present suit (Pet., pp. 3-4).

This question again turns on the interpretation of the stipulations. The Circuit Court held that the stipulations did not purport to preclude a private action. Petitioners differ with this interpretation. But that is no ground for certiorari.

3. Petitioners' third question is whether the doctrine of *Ex parte Young,* 209 U. S. 123 (1908), should not protect them against the "destructive civil penalties" which, they say, this action would impose on them (Pet., p. 4).

Ex parte Young holds that a statute is unconstitutional where "the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation" (209 U. S., at 147). Petitioners imply that Section 4 of the Utility Act, as construed by the Court below, imposes civil "penalties" so destructive as to intimidate them from testing the constitutionality of the statute. This argument raises no serious or important question because:

(a) Petitioners did in fact seek and obtain a judicial determination of the constitutionality of Section 4 of the Utility Act. *Electric Bond and Share Co.* v. *S.E.C.*, 303 U. S. 419. There was thus no "intimidation".

(b) Whether or not the recovery in this action will be "destructive" remains to be seen. The Circuit Court expressly refused to rule on the measure of recovery (R., p. 110). The mere surrender by petitioners of their profits—which according to petitioners would be the proper measure of recovery—certainly would not be "destructive".

In advance of the final judgment the argument of destructiveness is thus, to say the least, premature; it confirms the wisdom of the rule that certiorari will ordinarily not be granted from an interlocutory decree.

4. Petitioners' fourth question in effect repeats their first. Section 26(b) of the Utility Act invalidates all contracts violating any provision of the Act. The service contracts here involved violated Section 4(a)(2) of the Act. Petitioners seek a ruling that the service contracts are, nevertheless, valid by reason of their stipulations with the Government.

That question, again, goes to the interpretation of the stipulations. The Circuit Court held that they did not purport to grant petitioners immunity from private suit. Petitioners would favor a different interpretation. But that does not justify certiorari.

5. As their last question, petitioners ask whether Section 4(a)(2) of the Act, which prohibits an unregistered holding company from "directly or indirectly" making and performing service contracts, prohibits such contracts if made by a subsidiary organized for that very purpose. This precise question has already been determined by this Court, which enjoined the very service contracts here involved. *Electric Bond and Share Company* v. *S.E.C.*, 303 U. S. 419. Certiorari should not be

granted to re-consider a question which was but recently determined by this Court.

Not only are petitioners' questions of insufficient importance to warrant certiorari; but, as we now proceed to show, petitioners' criticism of the decision below, even if examined on its merits, is unfounded. For greater clarity, we shall first discuss the basis of our claim and will then turn to the alleged defense based on petitioners' stipulations with the Government.

POINT I

The service and construction contracts violate Section 4(a)(2) of the Utility Act, 15 U.S.C.A., Section 79d(a)(2).

(Replying to Petition, pp. 20-23)

The section, so far as pertinent, provides:

> "Sec. 4. (a) After December 1, 1935, unless a holding company is registered under section 5, it shall be unlawful for such holding company, directly or indirectly—
>
> * * * * * * *
>
> (2) by use of the mails or any means or instrumentality of interstate commerce, to negotiate, enter into, or take any step in the performance of, any service, sales, or construction contract undertaking to perform services or construction work for, or sell goods to, any public-utility company or holding company".

Petitioners contend that the section is inapplicable; for its prohibition is addressed only to "holding com-

panies"; and Ebasco and Phoenix, with whom the service contracts were made, are not in that category.

1. The performance of these very service contracts was enjoined in *Electric Bond and Share Co.* v. *S.E.C.*, 303 U. S. 419. The peculiar position of Ebasco and Phoenix and the details of their service contracts were fully disclosed (fols. 1054 *et seq.* of the record in that case). Necessarily, this Court held that these service contracts violated Section 4(a)(2). Indeed, this Court, after summarizing the service contracts (303 U. S., at 432), held (p. 440):

> "That they (defendants) conduct such transactions through the instrumentality of subsidiaries cannot avail to remove them from the reach of the federal power. It is the substance of what they do, and not the form in which they clothe their transactions, which must afford the test."

2. The violation of Section 4(a)(2) is clear. EBS was an unregistered holding company (35, 36, 38). After the enactment of the Utility Act, and for the very purpose of circumventing it, EBS organized Ebasco and Phoenix and caused them to make the service contracts (44-46, 163-8; see also *Electric Bond and Share Co.* v. *S.E.C.*, 303 U. S., at 432). The contracts are, therefore, plainly within Section 4(a) which forbids an unregistered holding company "*directly or indirectly*" to make or perform service contracts.

3. Moreover, Section 27(a) of the Utility Act, 15 U.S.C.A., sec. 79z-1(a), provides:

> "It shall be unlawful for any person, directly or indirectly, to cause to be done any act or thing through or by means of any other person which it

> would be unlawful for such person to do under the provisions of this title or any rule, regulation, or order thereunder."

The section is self-explanatory. The term "person", by definition, includes a corporation; Section 2(a)(1) of the Act, 15 U.S.C.A., sec. 79b(a)(1). Section 27, we submit, establishes that an unregistered holding corporation (such as EBS) performing service contracts through the instrumentality of a wholly owned subsidiary (such as Ebasco and Phoenix) violates Section 4(a)(2).

4. Petitioners argue that the words "directly or indirectly" cannot extend Section 4(a) to include subsidiaries of holding companies; for wherever the Act purports to include subsidiaries, it refers to them expressly.

This argument rests on a misunderstanding of the Act. To be sure, some of the prohibitions of the Act are expressly addressed to subsidiaries; and, accordingly, all subsidiaries are automatically governed by such prohibitions, *without any need of showing that the subsidiary was used for the purpose of circumventing the Act.* Other prohibitions are addressed only to holding corporations, but are amplified by the words "directly or indirectly" and by the broad clauses of Section 27(a); those prohibitions are ordinarily not applicable to subsidiaries; but they must be applied where a holding company uses the subsidiary for the purpose of evading the Act through indirection. Section 4(a) belongs in the second category. Normally, therefore, all subsidiaries may engage in the activities listed in Section 4(a), even though their parents are unregistered. But that privilege ends where an unregistered holding company uses

the subsidiary as a device to evade the Act. By so using the subsidiary, the holding company violates Section 4(a).

In the present case, EBS organized Ebasco and Phoenix for the very purpose of evading the Act (44-46, 163-8). EBS thus violated the Act by indirection; it has, therefore, contravened both the letter and spirit of Section 4(a).

Accord: *Weinberger* v. *Semenenko,* 36 N. Y. Supp. 2d 396, at 406 (S. Ct., N. Y., 1942).

5. Petitioners contend that our construction of Section 4(a) would prevent every operating subsidiary of an unregistered holding company from engaging in the activities listed in Section 4(a), such as the interstate transmission of natural gas or electricity. The result, say petitioners, would be a nation-wide disruption of utility services, which Congress cannot have intended (Pet., p. 22).

Petitioners' apprehension is unfounded. Only those operating subsidiaries are banned which are used by their unregistered parent to *circumvent* the Act. A subsidiary *bona fide* engaged in the interstate activities described in Section 4(a) may continue, even though its parent fails to register.

POINT II

The service contracts are void pursuant to Section 26(b) of the Utility Act, 15 U.S.C.A., Section 79z(b).

(Replying to Petition, p. 19)

Section 26(b), so far as pertinent, provides:

"Every contract made in violation of any provision of this title * * * and every contract

> heretofore or hereafter made, the performance of which involves the violation of * * * any provision of this title * * * shall be void (1) as regards the rights of any person who, in violation of any such provision * * * shall have made or engaged in the performance of any such contract * * *."

This provision would seem to require no comment. Since the service contracts violate Section 4(a) of the Act, they are rendered void by the express provision of Section 26(b).

But petitioners contend that "Section 26(b) of the Act is inapplicable to violations of Section 4(a)" (Pet., p. 19). For this contention they invoke language of Judge Mack in the *EBS* case to the effect that, "with minor exceptions," no provision of the Act other than Sections 4 and 5(a) is applicable to a non-registered holding company such as EBS (Pet., pp. 11, 43). Petitioners conveniently ignore the reference to "exceptions" and conclude that Section 26(b) is not applicable to unregistered holding companies.

This argument would mean that an unregistered holding company may, in the teeth of Section 4 of the Act, enter into service and construction contracts; that, despite Section 26(b), such contracts are valid and enforceable; and that, despite Congressional condemnation of such contracts (Section 1(b)(2) of the Act), our courts must compel their performance. This conclusion hardly commends itself.

But even worse. Petitioners' argument that Sections 4 and 5(a) are literally the only provisions applicable to unregistered holding companies, would also preclude Section 18(f), 15 U.S.C.A., sec. 79r(f). That provision au-

thorizes the S.E.C. to sue to enjoin violations of the Act. According to petitioners, the S.E.C. would be helpless to restrain violations of Section 4 by an unregistered holding company. Or, at least, this is how petitioners would read Judge Mack's decision.*

However, the very suit before Judge Mack was brought by the S.E.C. under Section 18(f). This Court expressly so held; and it sustained the applicability of the section (303 U. S., at 439, 443). So did the Circuit Court (92 F. 2d, at 583) and, by necessary implication, Judge Mack. Since non-registration did not immunize EBS from the reach of Section 18 (f), neither does it exempt EBS from Section 26(b).**

POINT III

Plaintiff may compel the refund of the illegal service payments.

(Replying to Petition, p. 20)

Petitioners do not question the ruling below (R., p. 110) that, under the Utility Act, the operating companies are entitled to a refund. But petitioners contend that this right may be enforced only by the S.E.C., not by plaintiff (Pet., p. 20.).

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* Petitioners' argument would also render inapplicable Section 29, 15 U.S.C.A., sec. 79z-3, which provides criminal penalties for violations of the Act. According to petitioners, an unregistered holding company thus might flout Section 4 with complete impunity.

** From the context of Judge Mack's decision it is plain that he meant to preclude the application to EBS only of Sections 6 to 17 which are in terms confined to *registered* holding companies. Sections 18 to 32 clearly embrace both registered and unregistered companies. This was also Judge Mack's view; witness the fact that his decision (as well as that of this Court and the Circuit Court) turned on Section 32 of the Act (see 18 F. Supp., at 136; 92 F. 2d, at 592; 303 U. S., at 434).

The trouble with this contention is that the S.E.C. has no power to compel the refund. The Circuit Court so held (R., p. 112). Nevertheless petitioners do not even state under what provision of the Act the S.E.C. might proceed. There is no such provision. Hence, if private enforcement were barred, the right to a refund would be without a remedy.

The Court below indicated the grounds justifying private enforcement (R., pp. 110-111). Petitioners do not attempt to controvert this reasoning. We therefore respectfully refer to the decision below, instead of repeating it here.

POINT IV

The doctrine of *Ex parte Young* does not prevent recovery.

(Replying to Petition, pp. 17-18)

Petitioners argue that invalidation of the service contracts would be so harsh a penalty as to discourage any attempt at testing the constitutionality of the Public Utility Act; penalties of that character, it is said, are unconstitutional under the doctrine of *Ex parte Young*, 209 U. S. 123 (1908), and *Missouri P. R. Co.* v. *Tucker*, 230 U. S. 340 (1913).

1. The constitutionality of Section 4(a) has been upheld by this Court after extensive argument and full consideration; *Electric Bond and Share Co.* v. *S.E.C.*, 303 U. S. 419.

2. The *Young* and *Tucker* cases condemn only penalties so excessive as to discourage a court test of the constitutionality of the statute. Petitioners have tested

the statute to the hilt; *Electric Bond and Share Co.* v. *S.E.C., supra.* This pragmatic test alone disproves the applicability of the rule of *Ex parte Young.*

3. The rule of the *Young* and *Tucker* cases forbids civil penalties "so arbitrary and oppressive that their enforcement would be nothing short of the taking of property without due process of law" (*Missouri P. R. Co.* v. *Tucker,* 230 U. S., at 351). The imposition of double or treble damages would not come within this definition (*ibid.,* 230 U. S., at 348).

In this case the measure of recovery has not yet been settled (R., p. 110). Perhaps petitioners must surrender only their profits; and certainly they need not pay more than they actually received. Recovery will thus be neither arbitrary nor oppressive.

4. The rule of the *Young* and *Tucker* cases has never yet been applied to statutes invalidating contracts made in violation of a declared public policy. Such statutes are, of course, very numerous. If petitioners' argument were sound, all of them would be unconstitutional. For in every such case a party might enter into a very sizable contract violating the statute, and could then argue that the statute is unconstitutional because it invalidates the contract and thereby subjects the party making it to an excessively harsh penalty.

5. The doctrine of *Ex parte Young* is confined to cases "where the validity of the act depends upon the existence of a fact which can be determined only after investigation of a very complicated and technical character". *Ex parte Young,* 209 U. S., at 148; *Missouri & P. R. Co.* v. *Tucker,* 230 U. S., at 350; *Noble* v. *Carlton,* 36 F. (2d) 967, at 969 (D.C., S.D. Fla., 1930). The

validity of the Utility Act depends solely upon questions of law. *Weinberger* v. *Semenko, supra,* 36 N. Y. Supp. (2nd) 396, at 405. The doctrine of the *Young* and *Tucker* cases is, therefore, inapplicable.

POINT V

Petitioners' stipulations with the Government do not exempt them from civil liability.

(Replying to Petition, pp. 13-17, 19)

1. The provisions of the Utility Act forbidding and invalidating service contracts of unregistered holding companies are absolute. No public agency or official can override the Congressional mandate, except under authority given by the statute itself. Petitioners profess (Pet., p. 19) to find such authority in Section 20(d) of the Act, 15 U.S.C.A. sec. 79t(d), which, so far as pertinent, provides:

> "No provision of this title imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule, regulation or order of the Commission, notwithstanding that such rule, regulation, or order may, after such act or omission, be amended or rescinded or be determined by judicial or other authority to be invalid for any reason."

2. At the threshold we find that petitioners' stipulations with the Attorney General (Pet., pp. 28, 31-35) and the Postmaster General (Pet., pp. 28-29, 36) are beside the point; for neither of these officials is mentioned in Section 20(d). We turn, therefore, to petitioners' transactions with the S.E.C.

3. Petitioners invoke an S.E.C. press release of November 22, 1935 (Pet., pp. 37-38). Only one sentence thereof is even remotely in point:

> "In the meanwhile, at least for the immediate future and until further notice, the Commission does not intend to make any recommendations to or requests upon the Department of Justice for the institution of proceedings to enforce criminal liabilities under the Act" (Pet., p. 38).

That this provision does not aid petitioners hardly requires comment. The quoted sentence refers only to Committee action, not private action; only to criminal steps, not civil redress; and it operates only for "the immediate future and until further notice".

4. Of petitioners' stipulation with the S.E.C. (Pet., pp. 29-30), only two sentences can possibly have a bearing on this case. The first recites:

> "Neither the Commission nor the Members of the Commission will institute or request the Attorney General or any United States Attorney to institute any further civil or criminal proceedings against the defendants or any of them, or any of their directors, officers, agents or employees, at least until such time as the constitutionality of Sections 4 and 5 of the Act has been finally adjudicated in this proceeding." (Pet., p. 30)

This sentence gives petitioners no comfort; for, apart from other reasons, the Commission's covenant not to sue expired when, on March 28, 1938, this Court finally sustained the constitutionality of Sections 4 and 5 of the Utility Act.

5. The next sentence of the stipulation recites:

> "In the event that Sections 4 and 5 of the Act are adjudicated to be constitutional in this proceeding, neither the Commission nor the Members of the Commission will request the Attorney General or any United States Attorney to prosecute the defendants or any of them, or any of their directors, officers, agents or employees for any violation of the Act which occurred prior to the date of such adjudication." (Pet., p. 30)

This clause likewise does not aid petitioners.

(a) In contrast to the preceding sentence, the Commission merely foregoes the right to request action by the Attorney General or any U. S. Attorney. There is no suggestion that action by the Commission itself or by private parties is to be precluded.

(b) Even concerning the Attorney General and the U. S. Attorneys the clause is extremely limited. They shall not be requested to "prosecute" petitioners, *i.e.*, to institute *criminal* proceedings against them. Petitioners' *civil* responsibility was thus clearly preserved. This language contrasts with that of the preceding sentence which, until final judgment in the EBS case, barred requests to the Attorney General or any U. S. Attorney to institute "civil or criminal proceedings".

6. The stipulation thus had two very limited objectives: (a) While the EBS action was pending, petitioners were not to be harassed by other Governmental actions, civil or criminal; and (b) after final judgment in the action, petitioners were not to be *criminally* prosecuted for pre-judgment violations. But the right, after termination of the suit, to bring *civil* action for pre-judg-

ment violations was not impaired. Clearly, therefore, the stipulation did not purport to authorize petitioners to do what the Utility Act forbade. It did not purport to secure to them the fruits of their violations of the Act. It did not purport to permit or to make lawful the illegal service contracts. Accordingly, petitioners, in making and performing the service contracts, did not act "in conformity with any rule, regulation or order of the Commission", as required by Section 20(d) of the Act.

7. Because of this limited scope of the stipulation, it is unnecessary to demonstrate that the stipulation is not a "rule, regulation or order" of the S.E.C. within the meaning of Section 20; and that petitioners have not shown and cannot, upon their present motion, show that, in making and performing the service contracts, they acted "in good faith", as required by Section 20(d).

8. Petitioners also invoke a later stipulation allegedly made with the Government on March 31, 1938, after this Court's decision in the EBS case (Pet., pp. 15, 52-54). However, that stipulation is not part of the records of this Court; it cannot, therefore, be considered on this petition. Moreover, petitioners never relied on this alleged stipulation in the Courts below; reliance thereon before this Court is, therefore, improper.

But even if this stipulation might be considered, it would be ineffective, under Section 20(d) of the Utility Act, to protect petitioners. The protection of Section 20(d) applies only to acts "done or omitted in good faith in conformity with any rule, regulation or order of the Commission", even though such order, rule or regulation may subsequently be amended, rescinded or declared invalid. Petitioners' acts charged in the complaint

were all committed prior to the stipulation of March 31, 1938, and, consequently, not in reliance thereon. On April 1, 1938, the day following the stipulation, EBS registered with the S.E.C.

CONCLUSION

Stripped of all technical detail, this complaint alleges that EBS, while assailing the constitutionality of the Utility Act in the courts, continued to exact and to receive from its controlled operating companies service payments which the Act strictly forbade. In common decency and fairness, EBS should have reserved these amounts for return to the operating companies in case EBS should lose its court fight. EBS did finally lose in the courts. But in actuality EBS claims to have won. For it claims the right to retain the illegal service payments, as though the Utility Act had become effective only in April, 1938, and not, by its terms, on December 1, 1935. If, for this period of more than two years, EBS was, indeed, *legibus solutus*, then this complaint must be dismissed. But otherwise petitioners' numerous technical objections, however ingenious, should be brushed aside and the complaint sustained.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

Dated, New York, July 8, 1944.

Respectfully submitted,

NATHAN WITT,
Counsel for Respondent.

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CHARLES ELMORE CROPLEY
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IN THE

Supreme Court of the United States

OCTOBER TERM—1943

No. 1036

C. E. GROESBECK, C. V. GRAHAM, O. L. JOHNSTON, G. N. TIDD, E. P. SUMMERSON, H. L. ALLER, J. R. HOBBINS, ELECTRIC BOND AND SHARE COMPANY and EBASCO SERVICES INCORPORATED,
Petitioners,

and

S. R. INCH, A. S. GRENIER, C. F. KELLEY, S. A. MITCHELL, P. B. SAWYER, E. B. TRACY, H. T. WHITE, W. R. KENAN, W. V. GRIFFIN, L. H. PARKHURST, W. D. THORNTON, E. ERICSON, F. R. BAUER, J. W. FROST, D. W. JACK, NEBRASKA POWER COMPANY, NEW MEXICO ELECTRIC SERVICE COMPANY, NORTHERN POWER COMPANY, NORTHWESTERN ELECTRIC COMPANY, PACIFIC POWER & LIGHT COMPANY, INLAND POWER & LIGHT COMPANY, PORTLAND GAS & COKE COMPANY, SUPERIOR WATER, LIGHT AND POWER COMPANY, TEXAS ELECTRIC SERVICE COMPANY, TEXAS POWER & LIGHT COMPANY, TEXAS PUBLIC UTILITIES CORPORATION, THE WASHINGTON WATER POWER COMPANY, AMERICAN POWER & LIGHT COMPANY, CENTRAL ARIZONA LIGHT AND POWER COMPANY, FLORIDA POWER & LIGHT COMPANY, KANSAS GAS AND ELECTRIC COMPANY and THE MINNESOTA POWER COMPANY,
Defendants,

v.

DORA GOLDSTEIN,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

JOHN F. MACLANE,
LOUIS CONNICK,
WHITNEY NORTH SEYMOUR,
Counsel for Petitioners.

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Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

This reply brief is submitted because the respondent's counsel misconceives the issues both in the case at bar and in *Electric Bond and Share Company* v. *Securities and Exchange Commission*, 303 U. S. 419 (1938), and the scope and effect of the decision in the latter case.

This suit is not one to obtain redress for wrongs practiced by a controlling company upon its subsidiary, or for the enforcement of remedial legislation enacted to remedy such wrongs. The cause of action stated in the complaint now before the Court is one solely to recover a penalty imposed by statute to enforce acceptance of its obligations. The penalty has no relation to standards of conduct elsewhere prescribed in the statute, and is lifted by the formula of compliance. No cause of action is stated in the complaint based upon abuse of parent-subsidiary relationships (excess of charges over value of service or other improper practice), and the causes of action for violation of statutory standards (excess of charges over cost) were withdrawn (Petitioner's Brief, p. 6). Such causes of action are treated in respondent's brief, and in the opinion of the Court below, in effect, as still before the Court.

The Electric Bond and Share Company test case determined only that the penalty was valid and could be enforced if the defendants therein refused to signify their acceptance of the statute. The decree did not hold the contracts here in question void, nor was their validity in any way in issue. It merely invoked the penalty of deprivation of the right to use the mails and instrumentalities of commerce until the defendants registered and thus signified their acceptance of the statute (Record in Electric Bond and Share Company case, Vol. VIII, pp. 21-61, 62-65). Further, the decree by its terms postponed the effective date of the penalty until thirty days after the date of the decree, or, if appeal should be taken, thirty days after the filing of mandate from the Appellate Court in the District Court.

As stated in petitioner's brief (pp. 10-12; Appendix, pp. 43-48), the issues presented here as to the application

of Section 26(b) of the Public Utility Holding Company Act to activities prohibited by Section 4(a) of the Act were decided adversely to the contentions here made by respondent. Suing derivatively as a stockholder of a defendant in that case respondent is bound by that decision. In this respect the decision of the Court below is in direct conflict with the findings and conclusions in that case.

The decision of this Court in the test case made no findings as to the validity of the contracts in question, and discussed their performance as involving the use of the mails and instrumentalities of commerce, together with other activities of petitioner and its associated companies, such as sales of electricity and securities, solely from the viewpoint of establishing the power of the Federal Government to regulate these activities, by denying the use of the mails and instrumentalities of commerce unless these companies should register under the Act, and furnish the information as to their activities required in the act of registration. 303 U. S. 419, 431-433. The quotation from page 440 of the opinion on page 10 of respondent's brief is lifted from its context and gives an entirely erroneous impression as to this Court's decision.

In view of the foregoing, there is no warrant for the statements in respondent's brief (pp. 3-4, 10) that the test case was brought to enjoin performance of the service contracts, or (p. 4) that this Court there held that such contracts violated Section 4 of the Act.

Respondent's analysis of the terms of the stipulation of the parties in the test case (Respondent's Brief, pp. 17-21) ignores its essential purpose, which was to secure an orderly determination of issues of great public importance without the confusion which would have resulted from involving one of the major industries of the Country in chaos pend-

ing such determination, its interpretation by the chief law officers of the Government, and its acceptance by the Courts as basis for their decisions as discussed in petitioner's brief (pp. 8-12; Appendix, pp. 39-51). The question presented is not one of narrow textual construction divorced from context and the action of the parties and the Courts based thereon, but of its true intent and meaning and practical effect as embodied in judicial decrees. This question is directly and completely presented by this record, and the decree, while interlocutory in form, is dispositive thereof (Petitioner's Brief, p. 6).

The questions of law discussed in respondent's brief (pp. 9-17) are sufficiently discussed in petitioner's brief with respect to this matter.

Respectfully submitted,

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No. 101

In the Supreme Court of the United States

OCTOBER TERM, 1944

C. E. GROESBECK, C. V. GRAHAM, O. L. JOHNSTON, ET AL., PETITIONERS

v.

DORA GOLDSTEIN

ON PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM ON BEHALF OF THE UNITED STATES AND THE SECURITIES AND EXCHANGE COMMISSION AS AMICUS CURIAE

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Neither the United States nor the Securities and Exchange Commission has participated in any way in this case in the lower courts, and we do not desire to take any position in this Court on the merits of any of the issues raised by the petition for a writ of certiorari. However, the controversy between the petitioners and the respondent revolves in large part around the meaning and legal effect of certain statements made by the Government as to its position in the litigation

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which culminated in this Court's decision in *Electric Bond and Share Company* v. *Securities and Exchange Commission,* 303 U. S. 419 (hereinafter referred to as the *Bond and Share* case); and we believe that we may be helpful to the Court in resolving this controversy by calling the Court's attention to additional statements, not cited in the petition or the brief in opposition, which were made with respect to the Government's position and which are part of the public record in the *Bond and Share* case or in cognate litigation likewise involving the constitutionality of the Public Utility Holding Company Act of 1935. We wish also to point out to the Court certain considerations of public policy which we believe call for prompt determination of all the basic issues involved in this proceeding.

I

THE GOVERNMENT'S POSITION IN THE BOND AND SHARE LITIGATION

As indicated in the petition for a writ of certiorari, various officials of the Government, in anticipation of litigation as to the constitutional validity of the Public Utility Holding Company Act, made public announcements as to the position of the Government with respect to the enforcement of the Act pending determination of the constitutionality of its registration provisions. These announcements, made by the Attorney General, the

Postmaster General, and the Securities and Exchange Commission, were incorporated in the stipulation of facts entered into as a basis for the trial of the *Bond and Share* case, which had been selected by the Government as a constitutional test case. In the instant petition for a writ of certiorari the petitioners rely upon these announcements, and the stipulation of facts in the *Bond and Share* case, as a bar to the maintenance of the present private action to recover payments allegedly made in violation of the Act during the period between its effective date and April 1, 1938, the date of Bond and Share's registration following this Court's opinion affirming the constitutionality of the registration provisions (303 U. S. 419, decided March 28, 1938). Of the announcements and the stipulation the petitioners state (Pet. 10):

> Placing full faith in and reliance upon these declarations and the stipulation the defendants, including Electric Bond and Share Company, Ebasco Services Incorporated and American Power & Light Company, continued the conduct of their business pending the outcome of the case. Reciprocally, defendants refrained from instituting a multiplicity of suits, securing preliminary injunctions or otherwise creating procedural embarrassments (see p. 15, *infra*).

In their briefs and arguments before the District Court, the Circuit Court of Appeals and the Supreme Court, the Government,

> through its counsel, took the position that the defendants were immune from the consequences, including those imposed by Section 26, of violations of the Act until final determination by the Supreme Court (Appendix, p. 50). * * *

The respondent disputes petitioners' interpretation of these statements of the Government's position (Br. 17–21), contending that whatever effect the statements might have had with respect to the institution of governmental action, they did not purport to, and could not, protect petitioners from the eventuality of private suit. This interpretation was accepted by the circuit court of appeals. We express no view on the merits of this dispute, but for the assistance of the Court we set forth at length various other statements with regard to the Government's position made in the record and briefs in the *Bond and Share* litigation, and in the briefs in this Court in *Burco, Inc.* v. *Whitworth, et al.,* Nos. 834 and 835, October Term, 1935, certiorari denied, 297 U. S. 724, and *Landis* v. *North American Company,* 299 U. S. 248, two earlier cases in this Court arising out of the same constitutional controversy as was involved in the *Bond and Share* case. We believe that these additional statements will serve to illuminate the position taken by the Government in the *Bond and Share* litigation, and to aid the Court in determining the legal effect of that position.

1. Excerpt from Statement of the United States of America as *Amicus Curiae* filed in *Burco, Inc.*

v. *Whitworth*, Nos. 834 and 835, October Term, 1935, certiorari denied, 297 U. S. 724:[1]

(c) *Steps taken by the Government to ensure preservation of the rights of companies subject to the Act during the pendency of the Electric Bond and Share test cases.*—To ensure preservation of the rights of companies subject to the Act during the pendency of the Electric Bond and Share test cases, the Government has taken action in three directions. As a first step—taken before any suits were brought to enjoin the enforcement of the Act—the Securities and Exchange Commission issued regulations expressly permitting a holding company when registering to reserve any legal or constitutional right and to stipulate that its registration should be void and of no effect in the event that such a reservation should be judged invalid or ineffective.[20]

[20] As stated in the Petition for certiorari, the Circuit Court of Appeals for the Fourth Circuit, on the same day on which the decision in the instant proceeding was rendered, in *Public Utility Investing Corporation, et al.*, v. *Utilities Power & Light Corporation* (not yet officially reported), denied an application for a temporary restraining order pending an appeal from an order dismissing a stockholder's bill to enjoin a corporation from registering under the Act, stating in its opinion that the plaintiffs were "clearly not entitled to injunction in the absence of a reasonable ground to apprehend irreparable injury; and we see no reason to apprehend irreparable injury in the light of the permission given to register with reservation of constitutional rights."

[1] The excerpt set forth in the text appears at pp. 52–54 of the Statement. The litigation is that referred to at pp. 8–9

As a second step—taken before any suits were brought to enjoin the enforcement of the Act—the Attorney General and the Securities and Exchange Commission announced that the Commission would take the initiative to test the Act in a civil suit, that until the validity of the Act had been determined by this Court in such a civil suit neither the Attorney General nor the Commission would seek to enforce the criminal penalties of the Act, and that even after such determination they would not seek to exact penalties for earlier offenses. As a third step, the Postmaster General announced that even if he had the authority, he would not exclude any company from use of the mails because of any violation of the Act pending the judicial determination of its validity by this Court.

This procedure of the Government safeguards holding companies subject to the Act from the application to them of any unconstitutional provisions of the Act during the pendency of the Bond and Share litigation. Nevertheless the forty-six bills in equity referred to in the Petition for cer-

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of the petition in the instant proceeding. The Government was not a party to the litigation, but had appeared in the lower courts as *amicus curiae* to suggest the impropriety of using the particular litigation as a vehicle to test the constitutionality of the Act, and in its Statement as *amicus curiae* in this Court reiterated the suggestion as a basis for urging that the petition for a writ, which sought a constitutional test in this Court, should be denied even though its issuance was not opposed by any of the respondents thereto.

tiorari have been filed to restrain enforcement of the Act, virtually simultaneously, in a diversity of courts, and in a manner well calculated to cause the Government maximum physical difficulty. The Government agrees with Petitioner that such bills are without equity. But the Government disagrees with Petitioner's conclusion that the questions raised by those suits require in the public interest a review of the constitutionality of the Act in this proceeding. As stated, the Petition for an unexplained reason does not mention the availability of the Bond and Share suits to settle such questions. During the pendency of the Bond and Share suits, holding companies are protected; the suits, far broader in their coverage of the problems of the industry than this restricted proceeding, will offer a truly adequate case to test the constitutionality of the Act in a proceeding in which the Government has had an opportunity to share and in which the Act is applied to the kind of typical holding company situations which Congress had in mind at its enactment.

2. Statements in the briefs before this Court in *Landis* v. *North American Company*, 299 U. S. 248.[2]

[2] This case, like *Burco, Inc.* v. *Whitworth*, *supra*, involved an attempt to secure an adjudication as to the constitutionality of the Act in advance of determination of the *Bond and Share* case. The issue in this Court was the propriety of a lower court order, entered on motion of the Government,

(a) Excerpt from brief for the respondents (pp. 37–40):

> The acts and activities which are prohibited to unregistered companies by the Act (Section 4 (a)) are stated in a footnote. [Footnote omitted.] A reading of these prohibitions is enough to show that, if they are observed, they will make impossible the carrying on of a normal and profitable business by any holding company, in spite of the fact that many of them are in form prohibitions merely against doing the specified acts by the use of the mails or the instrumentalities of interstate commerce. And it is equally clear that, if these prohibitions are ignored, the cloud which will be cast on the legality of the contracts and other acts of such a company will paralyze its business to practically an equal extent. THAT THIS WAS BOTH THE INTENTION OF THE FRAMERS OF THE ACT AND THE EXPECTATION OF THOSE NOW ADMINISTERING IT IS CLEARLY SHOWN BY THE STATEMENT OF THE DEFENDANT LANDIS, CHAIRMAN OF THE COMMISSION, IN A PRESS RELEASE OF NOVEMBER 7, 1935, IN WHICH HE ASSERTED THAT "unless a holding company registers, the validity of any issue of securities which it may offer and of all acquisitions of property and of contracts made by it would be

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restraining further prosecution of the action (and of other similar actions instituted in the same court) pending final disposition of the *Bond and Share* case.

in question, at least until a *final* decision upon the issue of constitutionality was handed down by the Supreme Court."*

* * * * *

Until therefore the plaintiffs obtain a decree declaring the Act to be unconstitutional as against them, the validity of most of their corporate relationships and of practically every transaction or activity in which they normally engage will be subject to doubt and question. As the defendant Landis has himself suggested, what banker would undertake to sell, by public offering, an issue of their securities, until this stigma of illegality is removed by a *final* decision that the Act is void as applied to them? What must be the effect of that stigma upon *any* effort by them to negotiate a major or long-term contract, or to refund any of their outstanding securities or obligations?

For these reasons, it is clear that the Act, as is fully alleged in the bill of each plaintiff, constitutes a present and substantial cloud and encumbrance on its title to its investments, a present and substantial impairment of its freedom of contract, and a present impairment of its credit and of the value of its securities and other property. (See R. 6–22; AWW. R. 6–22.)

*The New York Times, page 1, November 8, 1935.

(b) Excerpt from the Government's brief (pp. 80–82):

In their answer to the petition for writs of certiorari in the present cases (p. 14), respondents contend that "until the Act is

finally declared to be unconstitutional as against these respondents [assuming it to be unconstitutional, as their bills allege], the cloud which its existence on the statute books will cast on the validity of practically every important act done by them in their essential corporate activities will practically paralyze the normal conduct of their business." But apart from any action or threat of action on the part of the petitioners which would be effectively stayed by an interlocutory decree, any cloud of illegality upon respondents' businesses springs not from any acts or threats or color of authority of the petitioners but from the Act itself. But respondents have brought their suits against the petitioners, not against the Act. If a cloud of illegality exists, it springs from section 26, which merely enacts the common law rule, making void as regards third persons contracts made in violation of law. And neither a permanent nor a temporary decree of the District Court against the petitioners can protect respondents against the rights of third persons not parties to the proceeding. The petitioners have no power either to enforce or to abrogate section 26; and the suits brought by the respondents against petitioners cannot remove a cloud which petitioners have neither created nor have the power to remove.

It is clear, therefore, that in so far as any permanent decree of the District Court in a proceeding against the petitioners could

protect respondents, respondents can obtain that same protection from an interlocutory decree having like force and effect during its pendency.[23] So far as future effectiveness is concerned, a permanent decree of the District Court no less than an interlocutory decree would have to yield to the law as subsequently declared by this Court in other cases (see pp. 72–77, *supra*).

[23] As was pointed out to the trial court and the Court of Appeals, if respondents' suits proceeded to trial and if respondents failed to establish any action or threat of action on the part of the petitioners against the respondents, the very serious question would arise whether there was any case or controversy between the respondents and the petitioners on which the jurisdiction of the court to render a permanent decree could be predicated. *Ex parte La Prade*, 289 U. S. 444; *Liberty Warehouse Co.* v. *Grannis*, 273 U. S. 70; *Ashwander* v. *Tennessee Valley Authority et al.*, 297 U. S. 288. This very question will be presented to this Court when this Court comes to consider the cross-bill in the Bond and Share suits.

3. Statements in the pleadings in the *Bond and Share* case.

The Bond and Share companies as cross-plaintiffs[3] cited Section 26 (b) of the Act as a threat

[3] The Government's suit was to enjoin Bond and Share and its principal subsidiary holding companies from continuing, unless they should register, the various activities which Section 4 (a) of the Act makes unlawful for an unregistered holding company. The cross-bill of the defendants sought an injunction against enforcement of, and a declaratory judgment as to the constitutionality of, the various regulatory provisions of the Act which are applicable by their terms only to registered holding companies and their subsidiaries. The problem of Section 26 (b), mentioned in the text, was

to their contracts (R. 157–162) and further alleged that whether or not the Act might be enforced by the imposition of either civil or criminal penalties "the existence of the provisions of such Act on the statute books * * * constitutes an immediate, present and irreparable threat, damage and injury to defendants' property, and causes an immediate impairment, of the value of said property and of defendants' businesses and casts a cloud on defendants' title to such property, and questions the validity of substantially every act and contract of defendants until the invalidity of such Act shall be judicially declared * * *" (R. 187).

The Government's reply to the cross-bill denied that the Bond and Share companies were subjected to any damage, irreparable or otherwise, by reason of any action or threat of action on the part of the cross-defendants (R. 221); alleged that the disposition of the issues raised by the Government's complaint would necessarily dispose of all issues raised as to the constitutionality of Sections 4, 26, and 29, being the only sections applicable to the defendants as non-registered companies (R. 221–222); and denied that the governmental authorities "have taken any action

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adverted to only in connection with the arguments as to whether it was necessary, or within the court's jurisdiction, to decide any of the issues raised by the cross-bill. Record citations in this section of the text refer to the printed record in the *Bond and Share* case in this Court, No. 636, October Term, 1937.

or have any authority to take any action under Section 26 (b) of the Act or that any decree of this Court against them or any of them can relieve the defendants of any inconvenience or damage alleged to be sustained because of the existence of such provision of the Act" or that "any of the defendants are or will be exposed to any damage, irreparable or otherwise, by their failure to comply with the provisions of Section 4 of the Act by reason of any acts or threats of the plaintiff or cross-defendants or otherwise before the validity of such provision is adjudicated by the Supreme Court of the United States" (R. 243).

4. Statements in the district court brief of the Government in the *Bond and Share* case.

The Government in the district court in the *Bond and Share* case filed three main briefs, devoted, respectively, to the facts, the scope of the issues, and the constitutionality of the registration provisions of the Act. In the brief on the scope of the issues, under the heading "THIS COURT IS WITHOUT JURISDICTION TO ENTERTAIN THE CROSS-BILL," there appear, at pp. 44–46, 47–48, 50–52, the following statements:

> A. THIS COURT IS WITHOUT JURISDICTION TO ENTERTAIN THE CROSS-BILL FOR THE PURPOSE OF DETERMINING THE VALIDITY OF THE PROVISIONS OF THE ACT APPLICABLE TO NON-REGISTERED HOLDING COMPANIES, BECAUSE THE DEFENDANTS IN THEIR DEFENSE TO THE PLAINTIFF'S BILL ALREADY HAVE AN ADEQUATE REMEDY AGAINST SUCH PROVISIONS.
>
> * * * * *
>
> The only provisions of the Act which are applicable to non-registered companies,

and, indeed, the only provisions which defendants themselves allege presently affect them as *non-registered* companies, are sections 4, 26, and 29. Section 4 (a) makes it unlawful for non-registered holding companies to use the mails or channels of interstate commerce for certain designated purposes. The enforcement of section 4 (a) is the express and exclusive purpose of the plaintiff's bill, and every possible issue thereunder is and will be raised and settled by the bill and answer.[15] Section 26 merely enunciates the common-law rule that contracts made in violation of law shall be void. That provision can have effect only as between defendants and third persons; it is not enforcible by the Commission or any other Government body or official. No action or omission by the Commission or any cross-defendant can relieve the defendants from the effects of section 26, and no decree of this Court against the Commission or any cross-defendant can bind third persons not parties to this proceeding.

Section 29 provides criminal penalties for violations of the Act; and it is true that a final judicial determination that defendants have violated section 4 (a) would technically subject them to penalties under section 29.[16] As a practical matter, however, defendants stand in no danger of

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[15] As to section 4 (b), see p. 6 n., *supra*.

[16] The plaintiff Commission has no authority to enforce criminal penalties or to bring any criminal proceedings. Section 18 (f) authorizes such proceedings to be brought solely by the Attorney Gen-

incurring any penalty for violations of section 4 except such violations as they may commit *after* the Supreme Court has finally determined the registration provisions valid. In official and public statements, the Securities and Exchange Commission, the Attorney General, and the Postmaster General disclaimed any intention, unless and until the constitutionality of the Act has been established by the Supreme Court, to enforce the civil or criminal penalties of the Act or to close the mails to violators, or thereafter to seek penalties for earlier offenses (S. 640–650). In their reply plaintiff and cross-defendants affirm such earlier announced policy and disclaimer (S. 220–227). And the stipulation states in unequivocal terms that the defendants have not been threatened by the plaintiff or any cross-defendant with any action other than plaintiff's bill in this suit in equity to compel compliance with the registration provisions of the Act (S. 271–275).

* * * If the defendants are sustained in their defense to the bill that they are not legally obliged to register, they will not only be free of the prohibitions of section 4, but they will not be subject to any penal-

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eral but only after evidence of violation has been transmitted to him by the Commission. The Commission has not transmitted and is not threatening to transmit any such evidence to the Attorney General, and even the actual transmission of such evidence by the Commission could not be questioned and brought into controversy by the defendants before the Attorney General attempted to move against them. *Federal Trade Commission* v. *Claire Furnace Co.*, 274 U. S. 160.

ties under section 29 for failure to register, and none of their contracts will be void under section 26. If on the other hand the provisions of section 4 are found valid in their application to the defendants in this proceeding, this Court will thereby have established that the defendants have no ground to complain of any liability to which they may thereafter be exposed under section 26 or section 29 by reason of their failure to register. The plaintiff has moved to resolve these questions in the manner least calculated to injure the defendants in the event that this Court determines that the defendants must comply with the registration provisions. And when this Court has determined the issues so raised by the bill, all such questions will necessarily be *res adjudicata* as between the parties. The cross-bill, therefore, in so far as it seeks to contest the validity of sections 4, 26, and 29—the only provisions of the Act which are in fact, or which defendants claim to be, applicable to them as non-registered holding companies—is unnecessary and must be dismissed.

B. THIS COURT IS WITHOUT JURISDICTION TO ENTERTAIN DEFENDANTS' CROSS-BILL FOR THE PURPOSE OF DETERMINING THE VALIDITY OF PROVISIONS OF THE ACT APPLICABLE SOLELY TO REGISTERED HOLDING COMPANIES, BECAUSE SUCH DETERMINATION WOULD BE AN ADVISORY OPINION AS TO THE RIGHTS AND DUTIES OF THE DEFENDANTS UNDER HYPOTHETICAL CIRCUMSTANCES

Defendants' cross-bill, in so far as it relates to provisions of the Act applicable

solely to registered companies, does not seek an adjudication of present rights, but is brought to obtain an advisory opinion as to defendants' general rights and duties in relation to the Act in the event that at some future time they register under the Act and thereafter—under circumstances not presently defined—come into contact with the provisions of the Act applicable to registered companies. This Court has no jurisdiction to render such an advisory opinion.

* * * * *

The defendants in the stipulation have clearly set forth that they deliberately refrained from registration because their counsel had advised them that registration "would involve a sacrifice of the status of a non-registered holding company, and would probably leave the company in a position where it would be required to attack specifically every order of the Commission which was deemed to be unlawful and violative of its rights" (S. 268). Defendants, by retaining this "status of a non-registered holding company," deliberately shielded themselves and their subsidiaries from any controversy which might involve the application and enforcement of the provisions of the Act relating solely to registered holding companies or their subsidiaries. By their action, or rather non-action, defendants have made it possible for themselves and their subsidiaries to sell securities, to

make acquisitions, to perform service, sales, and construction contracts, to make upstream loans, to engage in other intra-system transactions, and to keep their accounts in any manner they see fit, without running afoul of the provisions of sections 6, 7, 8, 9, 10, 11, 12, 13, 14, or 15, and without fear of the taint of illegality which the common law and section 26 might otherwise cast upon such transactions. By their action, or rather non-action, defendants have made it impossible for the Commission or any government official to proceed against them or their subsidiaries to enforce, or to penalize them for violating, any provision of the Act applicable solely to registered companies and subsidiaries of registered companies. So long as the defendants retain their "status of non-registered holding companies," they stand in no fear of the provisions of the Act which relate only to registered companies. Until they actually become registered companies, and until they actually contemplate a particular course of conduct which is proscribed or circumscribed by a provision of the Act applicable to them, the defendants present to this Court no controversy regarding any such provision of the Act. The only controversy presently before this Court involves the right of the defendants to continue in their status as non-registered holding companies.

5. Statements in the circuit court of appeals brief of the Government in the *Bond and Share* case.

The treatment accorded in the Government's brief in the circuit court of appeals to the impact of Section 26 on the rights of the members of the Bond and Share system is essentially similar to that reflected in the above excerpt from the district court brief, and therefore no extensive quotation is necessary. In the circuit court brief the development of Proposition A is somewhat abbreviated, and the discussion of Section 26 in relation to that Proposition is relegated to a footnote (n. 26, pp. 68–70). This footnote, substantially following the language quoted above from the district court brief, contains the statement: "No action or omission by the Commission or any cross-defendant can relieve the defendants from the effects of section 26, and no decree of the District Court, or any other court, against the Commission or any cross-defendant could bind third persons not parties to the proceeding." The discussion of Proposition B is less abbreviated. As did the district court brief, the circuit court brief contains, at p. 74, language substantially identical with that which the instant petition, at pp. 10–11, quotes from the Government's brief in this Court.

6. Statements in the Supreme Court brief of the Government in the *Bond and Share* case.

The contentions of the Bond and Share companies as to the necessity of a judicial ruling on the issues raised by their cross-bill had somewhat narrowed

by the time the case reached this Court, and, accordingly, the Government's Supreme Court brief contains no discussion, similar to the excerpts quoted above from the district court and circuit court of appeals briefs, with respect to the impact of Section 26 upon transactions which might be in violation of Section 4 or Section 5 of the Act. Nor have we found in the Supreme Court brief any references to Section 26 other than the passage quoted by the petitioners at pp. 10–11 of the instant petition. However, it may be helpful to note that this passage appears in approximately the same setting as do the similar passages in the briefs in the lower courts. It is taken from Part III of the brief, which is entitled "THE CROSS-BILL WAS PROPERLY DISMISSED." The introductory portion of the discussion adverts to the lack of necessity of considering Sections 4 and 5 of the Act in connection with the cross-bill, and includes the following statements (p. 205):

> * * * As stated in the opinion of the Circuit Court of Appeals, "the cross-bill is concerned only with provisions of the Act which deal with registered holding companies since the bill and answer provide ample opportunity to decide the issues presented by § 4 (a) and § 5 of the registration sections" (R. 2332).
>
> * * * For unless defendants are obliged to register, they could never have even hypothetical concern with the rest of the Act,

since it relates solely to *registered* companies. And defendants so admit (brief, p. 112).

Proposition I under Part III is headed "I. THE CROSS-BILL PRESENTED NO CASE OR CONTROVERSY BUT SOUGHT ONLY AN ADVISORY OPINION ON HYPOTHETICAL FACTS." The passage cited by the petitioners herein appears under this heading, and with portions of its context (pp. 207–209) reads as follows:

> * * * These defendants are not registered companies. But even if defendants were registered, they have set forth neither in their cross-bill nor in the stipulation any specific transaction or course of conduct which is proscribed, controlled, or limited by any provision of the Act applicable to registered companies.
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> * * * * * *
>
> * * * Defendants in the stipulation clearly set forth that they deliberately refrained from registration because their counsel had advised them that registration *"would involve a sacrifice of the status of a non-registered holding company, and would probably leave the company in a position where it would be required to attack specifically every order of the Commission which was deemed to be unlawful and violative of its rights"* (R. 268).
>
> If defendants believe that the registration provisions of the Act are unconstitutional, it is their privilege—and they have exercised it—to refrain from voluntary compliance. By their decision defendants have

made it possible for themselves and their subsidiaries to sell securities, to acquire securities and utility assets, to perform service, sales, and construction contracts, to make "up-stream loans," to engage in other intra-system transactions, and to keep their accounts in any manner which they see fit without running afoul of the provisions of sections 6 to 15, and without fear of the taint of illegality which section 26 might otherwise cast upon such transactions. But, having deliberately chosen to insulate themselves for a substantial period of time from the application of the very provisions of the Act which they now seek to attack in their cross-bill, surely defendants cannot be heard to complain if the result has also been to prevent any justiciable controversy over such provisions from arising.

Because the District Court could find no present controversy over any section of the Act other than the registration provisions, the Court was obliged to and did find as a fact that it could not "presently determine in what manner and to what extent and in what circumstances, if ever, any such provision of the Act or rule, regulation, or order thereunder will become applicable to any such defendant" (R. 2251, finding 67). * * *.

II

THE PUBLIC IMPORTANCE OF EXPEDITIOUS DETERMINATION OF THE ISSUES

We express no view with respect to the correctness of the decision of the court below on the

issues of law which that court undertook to determine, nor with respect to the conflicting assertions of the petitioners and the respondent as to whether the issues are of sufficient importance or novelty to justify review by this Court. However, we believe that in considering the petition for a writ the Court may properly take into account the impact of this action upon the statutory duty of the Securities and Exchange Commission to bring the Bond and Share system into conformity with the requirements of Section 11 (b) of the Public Utility Holding Company Act. Until the issues involved in this action are finally disposed of, it will be difficult for the Commission to discharge fully its responsibilities under Section 11 (b) with regard to the Bond and Share system.

Basic to any satisfactory plan of recapitalization, liquidation or other reorganization designed to accomplish the objectives of Section 11 (b) is a determination of the relative rights of the top holding company and the public security holders of its subsidiaries. This action places in issue those relative rights as regards the public security holders of American Power & Light Company, one of Bond and Share's principal public utility holding company subsidiaries. In itself the action thus directly affects a substantial portion of the Bond and Share system. But its impact is not limited to its direct effect; as the court below said in its opinion (142 F. (2d) 422, at p. 425): "Com-

panion cases which by stipulation of the parties await the outcome of this appeal concern other intermediate holding companies and their operating subsidiaries, so that, as it appears, substantially all the companies in the Bond and Share System are involved directly or indirectly in this litigation."[4]

From the presentation to this Court of the original *Bond and Share* case, the Court is undoubtedly familiar with the nature and extent of the Bond and Share system. Bond and Share is the largest of the registered holding company systems, with a vast number of public security holders and alone accounting for approximately 17% of the industry.[5] The size and complexity of the Bond and Share system make the application to it of Section 11 (b) of the Public Utility Holding Company Act an administrative task of major importance. In the Commission's approach to that

[4] We do not understand that the issues involved in this litigation apply to American Gas and Electric Company, one of the five major subsidiary holding companies of Bond and Share, since that company had its own servicing arrangements for its subsidiaries and did not receive services from Ebasco. The petition states (p. 7) that the relationships of American Gas and Electric Company to Bond and Share "are different and it is in no way involved in the present problem."

[5] At the time of the original *Bond and Share* litigation the system handled approximately 17% of the electric energy generated in the United States. See Appendix B to the Government's brief in this Court in the *Bond and Share* case, No. 636, October Term, 1935, at p. 41.

problem, one of the focal points has been the status of the various subsidiary holding companies in which Bond and Share has a minority but controlling interest. Orders of the Commission requiring the dissolution of two of these subsidiary holding companies, American Power & Light Company and Electric Power & Light Corporation, have been affirmed by the United States Circuit Court of Appeals for the First Circuit and are the subject of pending petitions for writs of certiorari (Nos. 166, 167, this Term). American Power & Light Company has substantial arrears of preferred stock dividends and while contesting the dissolution order has conceded the desirability of a substantial reorganization. It has filed with the Commission for its approval a program which involves the discharge of American's indebtedness and the substitution of a single class of stock for the existing common and preferred stocks. The Commission has consolidated this filing with the dissolution proceedings, and has considered it as raising the same questions as to the respective interests of various classes of security holders in the assets of American as would be raised by a plan to comply with the dissolution order. Similar action on the part of Electric Power & Light Corporation may ultimately be expected in the absence of reversal of the dissolution order. In the case of National Power & Light Company, another subsidiary holding company, no review has

been sought of an order requiring its dissolution,[6] and substantial progress has been made toward such dissolution. In the case of American & Foreign Power Company, Inc., a fourth sub-holding company, the Commission has issued a notice and order for hearing raising the question whether that company must be reorganized in order to conform with the standards of Section 11 (b) (2) of the Act.[7]

It is true that a determination of the respective rights of Bond and Share and the public security holders of its subsidiaries, for the purpose of passing upon any plan of reorganization, may well require a review of the entire course of intercompany relationships since the organization of the subsidiary holding companies, and thus involve many questions beyond the scope of the issues in this litigation. Nevertheless, possible recovery on behalf of subsidiaries for payments made under contracts held to be void for violation of the Holding Company Act is one of the elements which must be taken into account in any plan which attempts to be a complete settlement of the equities between Bond and Share and the public security holders of its subsidiaries. Even if plans could be worked out with some provision for adjustments contingent on the ultimate outcome of the pending

[6] See — S. E. C. —; Holding Company Act Release No. 2962 (1941).

[7] See Holding Company Act Release No. 4305.

litigation, the necessity for including such a provision would seriously complicate the problem of arriving at a satisfactory plan. Moreover, piecemeal reorganization is unsatisfactory in its impact on security holders, as well as for administrative reasons. Consequently, it seems inescapable that any material delay in finally determining the issues involved in this litigation will result in substantial if not corresponding delay in bringing about the orderly application of Section 11 (b) to a major segment of the industry.[8]

We urge, therefore, that this Court in considering whether to grant or deny the petition should consider which course is most likely to aid in expeditious termination of the litigation. In this connection we call attention to the fact that the circuit court of appeals, in holding that the complaint states a claim for relief, failed to pass upon the proper measure of damages to be applied in the event that liability should be established at the trial.[9] While we do not doubt that the court below could properly decline at this stage to pass upon that issue, there are reasons, not urged be-

[8] We wish to emphasize that the delay we fear will be occasioned not by any particular outcome to the litigation, but only by failure to bring the litigation to prompt and final determination in favor of one or the other of the parties.

[9] The court said, 142 F. (2d), at 427:

"The rule of damages—whether return of the full consideration, as plaintiff claims, or only the difference between the consideration and the value of the services received—need not be settled now in advance of answer and of trial on the merits."

low by the parties to the action, which we believe make the exercise of such self-restraint inappropriate in this case. The analysis required to determine whether as a matter of law the complaint is sufficient to state a claim for relief would seem to carry with it as a logical concomitant further analysis to determine what kind of relief could legally be awarded if the allegations of the complaint were sustained by the proof. We believe that such a determination could properly be made in advance of trial, and that the settlement of the question *in limine* would be likely to aid materially in shortening the period of the litigation.

Accordingly, we respectfully suggest that if the Court should regard the issues raised by the petition as justifying a grant of certiorari, and should upon consideration of the merits agree with the court below as to the sufficiency of the complaint, the Court should also undertake to decide the issues reserved below with respect to the proper rule of damages to be applied in such a case.[10] While we appreciate that this Court is ordinarily reluctant to decide questions which have not been passed upon by the courts below, this reluctance has been permitted to yield in cases where, as here, considerations of equity and public interest "require that the litigation be brought to an end

[10] If the Court should elect to follow this course, it would seem proper to include in the order granting the petition a direction to the parties to discuss the rule of damages in their briefs and on oral argument.

as quickly as possible." *Public Utilities Commission of Ohio* v. *United Fuel Gas Co.*, 317 U. S. 457, 463. *Cf. Gerdes* v. *Lustgarten*, 266 U. S. 321, 327; *Cole* v. *Ralph*, 252 U. S. 286, 290. So extending the scope of review in this case, if review is to be granted at all at this stage of the litigation, would go far to lessen the likelihood of delay which piecemeal review might occasion in the disposition of what is but a single controversy.

Respectfully submitted.

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